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No. A-142
IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

Gary A. Parfitt, et al.,
Petitioners

vs.

Columbus Correctional Facility, et al.,
Respondents

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO
* * * * * * * * * * *

PETITION FOR WRIT OF CERTIORARI
* * * * * * * * * * *

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioners, Gary A. Parfitt, et al., pray for a writ of certiorari to review the order of the Supreme Court of Ohio entered June 25, 1980.

I. Questions Presented For Review:

A. DOES FEDERAL DUE PROCESS UNDER THE V AND XIV AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES REQUIRE THAT A GOVERNMENTAL EMPLOYER ACCORD EMPLOYEES, WITH A PROPERTY RIGHT TO THEIR POSITIONS, NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO TERMINATION IN THE ABSENCE OF ANY CITED EXTENUATING CIRCUMSTANCES?

B. MAY A STATE AGENCY, SUA SPONTE, IGNORE ITS DULY ADOPTED REGULATIONS GRANTING TENURED CIVIL SERVICE EMPLOYEES PRETERMINATION NOTICE AND OPPORTUNITY TO REBUT OR DOES THE TENURED EMPLOYEE HAVE A DUE PROCESS RIGHT TO THE PROTECTION ACCORDED BY THE REGULATIONS?

II. Parties to the Proceeding Before the Ohio Supreme Court:

A. Appellants -

Columbus Correctional Facility
State Personnel Board of Review

B. Appellees -

Gary A. Parfitt
Louis M. Thomas
Charles H. Stilwell
Lawrence F. Weaver
James L. Perdue
Michael E. Acosta
Arthur J. Schmotzer
Charles R. Scott
Larry G. Picklesimer
Danny Ball
Richard K. Whitehurst
Robert M. Tatman
Ronald Chappell
Donald C. Doss
Theodore G. Cooper
Leroy Jones
Carla M. McMullan
Larry J. Martin

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VI. JURISDICTION

This motion for certiorari is brought from the judgment of the Ohio Supreme Court dated June 25, 1980 and journalized that same date. There were no motions for rehearing. The statutory provision conferring jurisdiction upon this court to review this motion is 28 U.S. 1257.

> Final judgments . . . rendered by the highest court of a State in which a decision could be had, may be reviewed by the

> Supreme Court . . . by writ of certiorari . . . where any title, right, privilege or immunity is specially . . . claimed under the constitution.

VII. PERTINENT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The text of the relevant constitutional, statutory, regulatory provisions involved herein is contained in the Appendices, pages 120-167.

These relevant provisions are:

A. United States Constitution, Amendment V.
B. United States Constitution, Amendment XIV
C. Ohio Revised Code, Section 111.15
D. Ohio Revised Code, Section 119.01 and 119.03
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VIII. STATEMENT OF THE CASE

On May 9 and 10, 1978, the Petitioner-employees were terminated as correctional officers of the State of Ohio, Department of Rehabilitation and Correction. These terminations were the culmination of incidents which began May 8, 1978. On that date at approximately 4:30 A.M., a picket line began forming across the street from the Columbus Correctional Facility (R. 40). At about 7 A.M. that same morning, David McKeen, Superintendent of the Facility, declared an emergency which had the effect of placing the institution on 12 hour shifts, cancelling all vacation leave and days off. (R. 41). Approximately 40 of the 58 day shift employees

scheduled to work had failed to appear. (R. 43,44).

Superintendent McKeen later testified that at about 10:55 A.M., he sent an employee to the picket line in order to inform the persons present there that they were to return to work immediately. (R.44). Later that same day, the superintendent obtained a temporary restraining order requiring the correctional officers to return to work. Although the superintendent indicated in his testimony before the State Personnel Board of Review, hereinafter "Board", that copies of this order were posted at the various entrances to the institution, the evidence presented also showed that it was not posted until about 11:05 P.M. (R. 46) No testimony was given before the Board as to whether the order was read to those

persons then present outside the institution, or if they were otherwise made aware aware of its contents.

On May 9, 1978, dismissal orders were completed for the Petitioners, Parfitt, Stilwell, Whitehurst, Tatum, Chappell and Cooper. The dismissals were to take immediate effect. (R. 143-144).

The disciplinary actions were brought pursuant to Rule 5120-7-05 of the Rules and Regulations of the Department. The Rule, promulgated as prescribed by law, is set out fully in the Appendix of this brief.

At no time prior to their removals were the Petitioners notified by mail, or otherwise, of the pendency of the charges being made against them. The record also indicates that no conferences were held

between the affected employees and any member of the department. (R. 69-71).

The pickets remained around the institution on May 9, 1978. At 2:45 P.M. on that date the superintendent indicated in his testimony that he again asked the striking employees to return to work but none of the employees returned (R. 50). On May 9, 1978, dismissal orders were compiled for the remaining employees to be effective May 10, 1978, citing neglect of duty and failure of good behavior as the reasons for dismissal (R. 69-71). Superintendent McKeen testified on cross examination that no conferences were held either prior to or after the firing of the remaining affected employees; nor were the employees notified by mail of the reasons for their dismissal; nor was there any opportunity for the affected

employees to give their versions of the facts prior to the termination as required by the Rules and Regulations of the Department (R. 69-71).

On June 5, 1978, a hearing was conducted before the State Personnel Board of Review where the terminations were upheld in a two to one decision in an order dated June 21, 1978. Appendix D, page 117.

The federal due process arguement was raised at this initial hearing by motion and in counsel's closing argument. (R. 72, 241-250) Appendice L&M, pages 168 and 170. This issue was specifically ruled upon by the board in its decision. Appendix D, page 103-108.

On July 6, 1978, the Petitioners, pursuant to Section 119.12 Ohio Revised Code, filed an original notice of appeal

with the board and with the Clerk, Court of Common Pleas, Franklin County, Ohio. In a final judgment entry filed February 15, 1979, the court affirmed the decision of the State Personnel Board of Review. The federal due process argument was raised in the Petitioner's brief and was adaressed by the court in its decision. Appendix N, page 184-188; Appendix C, page 78.

On March 16, 1979, a Notice of Appeal to the Franklin County Court of Appeals, Tenth Appellate District was filed. Again federal due process rights were a primary issue. Appendix O, page 189. The Appellate Court held that the failure to provide pre-termination conferences was a violation of law and that, therefore, the terminations were "not in accordance with the law".

The case was reversed and remanded by entry dated September 25, 1979. Appendix B, page 54-69.

The Department of Rehabilitation and Corrections filed Notice of Appeal with the Ohio Supreme Court on November 26, 1979. The issue of federal due process was argued in the briefs and decided by the court. See Appendix P, page 198, Appendix A, page 42. The decision of the Appeals Court was reversed and the decision of the Board was reinstated.

XI. REASONS FOR GRANTING WRIT

A. THE HOLDING OF THE OHIO SUPREME COURT IN THIS CASE THAT FEDERAL DUE PROCESS DOES NOT REQUIRE ANY PRE-TERMINATION OPPORTUNITY TO BE HEARD FOR STATE EMPLOYEES IS IN CONFLICT WITH FEDERAL LAW AS SET FORTH BY THE UNITED STATES SUPREME

COURT, FEDERAL COURTS OF APPEAL AND THE HIGHEST COURTS OF OTHER STATES.

The Ohio Supreme Court held in this case that no opportunity to be heard prior to the discharge of a civil service employee was necessary. It specifically stated that this holding was made in reliance on Arnett v. Kennedy, 416 U.S. 134 (1974)(hereinafter Arnett).[1] It further stated that the post discharge hearing provided under R.C. Chapter 124 was the equivalent of the procedure approved by the court in Arnett. Clearly in so holding the court erred.

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[1]The Ohio Supreme Court's reliance was most broad. It did not apply the balancing test suggested by Arnett nor did it find that any special circumstances justified the ommission of an opportunity to be heard prior to discharge.

In the instant case, the record stated and the Ohio Supreme Court found that

> [i]n removing the officers... David R. McKeen, the superintendent at the facility, failed to give the officers notice of the reasons for their removals and an opportunity to participate in a conference with him prior to issuing the removal orders. 62 Ohio St 2nd 434, 435.

The first hearing in this matter was before the State Personnel Board of Review on June 5, 1979, twenty-nine days after the discharge. In Arnett, the appellant was given the written charges against him thirty days prior to his dismissal and was given a chance to respond to them in writing. This fact was found to be significant by two of the five justices necessary for the majority. Justice Powell with whom Justice Blackmum con-

curred emphasized that the provision of a 30 day notice period after the presentation of the written charges and an opportunity to respond to the charges before any action was taken were important factors in determining the adequacy of the overall procedural scheme. See Arnett, 416 U.S. at 170. Thus the provision of notice and an opportunity for response are integral parts of a satisfactory due process procedure.

The Arnett decision has been read by the four federal courts of appeal to require notice and an opportunity to respond prior to discharge. The Third Circuit Court of Appeals in Louise B. et al. v. Colutti, 606 F. 2d 392 (3 Cir. - 1979) (hereinafter Louise B.) found that the employee was entitled to notice and an opportunity to be heard prior to dis-

charge. The Louise B. case involved employees who were discharged for illegally receiving welfare benefits while civil service employees. One of the appellants had received notice of the charges the day of her discharge. Another received no notice at all until after she had been suspended. Neither employee was given an opportunity to respond. The court noted

> although Arnett certainly stands for the proposition that a fullfledged adversary hearing need not be provided prior to termination, it does not stand for the proposition that no opportunity to rebut charges need be given prior to the taking of disciplinary action . . . Two circuits have specifically held that employees must be given the opportunity to rebut charges against them prior to being suspended. See Thurston v. Dekle, 531 F. 2d 1264, 1273 (5th Cir. 1976), vacated and remanded, 438 U.S. 901, 98 S. Ct. 3118, 57 . ed 2d 1144 (1978), on remand 578 F. 2d 1167 (5th Cir 1978) . . .

> [the remand was on another issue] and Muscare v. Quinn, 520 F. 2d 1212, 1215, (7th Cir 1975) (per curiam), cert. dismissed as improvidently granted 425 U.S. 560, 96 S. Ct. 1752, 48 L. ed. 2d 165 (1976) (per curiam) 606 F. 2d 392, 401.

In Thurston v. Dekle, supra, the Seventh Circuit Court of Appeals, in interpeting the mandates of Arnett, held that if a government employer wishes to delay the full evidentiary hearing until after the dismissal, it must accord the employee certain procedures intended to reduce the risk of wrongfully discharging an employee. These procedures include written notice of the reasons for discharge and an opportunity to effectively rebut the charges orally and in writing to the discharging official. The facts of Thurston v. Dekle, supra, indicate that

the employee was not given any prior notice of the charges against him and that he was suspended effective immediately.

In Muscare v. Quinn, supra, the court held that because employee discipline can result in substantial damage to a career, a reputation, and one's economic condition that at minimum due process requires prior notice and an opportunity to be heard.

Two additional court of appeals decisions on the issue of pre-termination notice and rebuttal opportunity are also of note. In Stretten v. Wadsworth Veterans Hospital, 537 F. 2d 361 (9th Cir.-1976), the court held that in terminating a resident at a Veterans Administration hospital, the resident was entitled to notice of his deficiencies, an oppor-

tunity to examine evidence against him and an opportunity to present his side of the story to the decision-maker. In that case such notice and an opportunity to be heard was accorded the resident numerous times prior to the discharge and the court sustained the discharge. In Davis v. Vandiver, 494 F. 2d 830 (5th Cir.-1974), the court found sufficient a procedure which provided for pretermination notice and an opportunity to respond prior to discharge. The court noted that this procedure was very similar to that approved in Arnett.

Thus the decision of the Third, Fifth, Seventh and Ninth Circuit Courts of Appeals have consistently read the Arnett decision to require notice and a pretermination opportunity to rebut the charges against the employee. These courts have

overruled discharges without prior notice and opportunity to rebut and have affirmed those with such notices and opportunity.

The highest courts of other states have likewise found Arnett to require prior notice and an opportunity to rebut. The Supreme Court of Minnesota in Nyhus v. Civil Service Board, 232 N.W. 2d 770, 304 Min 184 (Minn. 1975) discussed Arnett at length. It concluded that

> a majority of the court has held that a post-dismissal hearing complied with constitutional standards if certain procedural safeguards are present. These safeguards include a provision for advance written notice to the employee prior to his removal setting forth the reasons for the removal and providing the right to the employee to respond to the responsible official prior to the removal, coupled with a right to full

> evidentiary hearing after removal and back pay if the employee is reinstated. In our judgment, the holding of Arnett is equally applicable to a state civil classified position. 232 NW 2d at 781.

The holding of the Arnett case regarding notice of hearing was also found to be applicable to Idaho municipal employees in Buckalew v. Grangeville, 540 P 2d 1349 (Idaho - 1975). Again the requisites of notice and pre-termination hearing were noted and the case was remanded for failure to accord these procedures.

Several cases in which pre-termination notices and rebuttal opportunities were afforded, the procedural safeguards were found adequate, and in which Arnett was cited are Rockwell v. Bd. of Education 227 NW 2d 736, 393 Mich. 616, App. dism. 427 U.S. 901 (Michigan - 1975)

Brownlee v. Williams, 233 Ga. 548, 212 SE 2d 359 (Georgia - 1975) and Hortonville Education Ass'n v. Hortonville Joint School District, 225 NW 2d 658, 66 W. 2d 469, Cert. den. 96 S. Ct 3189 (Wisconsin - 1975). In no instances were the rebuttal opportunities full evidentiary hearings but nonetheless the employees had had a chance to be heard. Two other supreme courts have aknowledged the notice and pretermination requirement of Arnett as to tenured employees in cases involving civil service employees without property rights to their position. Presnell v. Pell, 260 S.E. 2d 611, 298 N.C. 715 (N.C. 1979.) In re Maher, 326 A. 2d 142, 132 Vt. 560 Vermont - 1974). See also, Leek v. Theis 539 P. 2d 304, 217 KAN 784 (Kansas - 1975) (A case which

with similar reasoning and resolution and which cites Arnett.)

Thus the Ohio Supreme Court in the instant case has surely errored in rejecting the overwhelming holdings of this court, the federal courts of appeals and the highest courts of other states that federal due process requires that employees with property rights to their positions be afforded prior notice and an opportunity to be heard prior to discharge.

B. THE HOLDING OF THE OHIO SUPREME COURT IN THIS CASE THAT THE FAILURE OF THE DEPARTMENT OF CORRECTIONS TO FOLLOW ITS OWN REGULATIONS DID NOT VIOLATE THE APPELLANT-EMPLOYEES DUE PROCESS RIGHTS IS CONTRARY TO FEDERAL LAW AS SET FORTH IN DECISIONS BY THE UNITED STATES SUPREME COURT, A FEDERAL COURT OF APPEALS AND A STATE SUPREME COURT.

The Ohio Supreme Court in the instant case held that the failure of the employer to follow its own duly promulgated rules requiring notice and a pretermination conference did not violate due process.[2] The court held that

> . . . a public employee in challenging his removal from employment may not assert the employer-agency's procedural rules, unless that employee is a member of the class which the rule was intended to benefit.
>
> It is extremely questionable whether these employees are among the intended beneficiaries of the rule. Although the rule arguably does provide an early opportunity for the employee to express his position, it can also be

---

[2]The Ohio Supreme Court did however acknowledge that these regulations had the effect of law and that the employer had violated the rules. The regulations required that the employer give the employee notice of the charges and a hearing prior to discharge or in certain specific cases a hearing within three days. Appendix K, page 150.

> viewed as a procedure designed to enhance the fact-finding process so that the appointing appointing authority can render a proper decision in the matter. 62 Ohio St 2d 434, 436.

The court reasoned that the rule had been promulgated as an internal rule and did not confer any rights on the employee. This conclusion rested on the court's reasoning that the rule was ambiguous as to whether or not the rule confered employee benefits. It then concluded from the rule-making procedure used that it did not confer any benefits on the employee, although the court further stated that the procedure per se is not of consequence unless an ambiguity existed.[3]

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[3]The court also stated very broadly that no prejudice could be shown as a result of the omitted notice and hearing. However, this begs the question as the denial of the due process right to notice and hearing are prejudical per se.

This reasoning is clearly an attempt at boot-strapping. The rule clearly benefits the employees and thus no ambiguity exists. Certainly, the party most affected by the discharge is the employee. The purpose of the fact-finding is to avoid an error prejudical to the employee. To allow the agency to unilaterally disregard regulations which have the force of law and which it has voluntarily imposed on itself is unjust.

This court in the case of Service v. Dulles, 354 U.S. 363 (1957) held that while the employer, the United States Secretary of State . . .

> was not obligated to impose upon himself more rigorous . . . procedural standards [for discharges]. . . having done so he . . . [can] not, so long as the Regulations remained unchanged proceed without regard to them.

> It being clear that . . . [the regulation] was not complied with by the Secretary in this instance, it follows that . . . the petitioner's dismissal cannot stand. 354 U.S. 353, 388.

Likewise in Vitarelli v. Seaton, 359 U.S. 535 (1959, an employee of the Department of Interior was discharged, in a manner in violation of regulations promulgated by the Department.[4] The Supreme Court had little difficulty in finding the removal to be void and of no effect. The Court stated,

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[4]The principle that a government agency is bound to follow its own rules and regulations has Supreme Court precedent to support it outside the area of employee relations. See, for example, Harmon v. Brucher, Secretary of the Army, 355 U.S. 579 (1954)(discharge of serviceman); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) (deportation proceeding), and Yellin v. United States, 374 U.S. 109 (1963) (House Committee on Un-American Activities proceedings).

> "[h]aving chosen to proceed against petitioner on security grounds, the Secretary here, as in Service, supra, was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily". 359 U.S. at 539-540.

The Court also stated:

> "Since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the standards he had formulated in Order No. 2738 for the dismissal of employees on security grounds. Service v. Dulles, supra; ID at 539.

In Arnett both the plurality and the concurring opinions note that due process rights of employees arise out of their property interests in their positions and such interests are "created and their dimensions are defined by state statutes." See 416 U.S. 134 at 151, 165. In the

instant case state law and regulations defined the appellants property rights to include employment which would not be terminated absent pre-discharge notice and hearing. Thus failure to accord these rights constitutes a deprivation of due process.

The reasoning of this court in Service v. Dulles, supra, as to internal discharge regulations being binding on employer-agencies was adopted by the United States Court of Appeals, District of Columbia Circuit in Bullock v. Mumford, 509 F. 2d 384 (D.C. Cir. 1974).

In that case Library of Congress discharged employees involved in a work-stoppage without according them the pre-termination conference which the Library's regulations required. The court stated that the

> Library has sua sponte adopted regulations on . . . separation. No doubt they bind the Library so that failure to follow them would make a separation unlawful. Service v. Dulles, 354 U.S. 363 (1957).

However, because in the Mumford case the employees who were not accorded hearing per the regulations did not properly raise the issue, the case was decided on a different issue.

The issue of the employer violating the employees due process rights by failure to follow its own regulations was also raised in a recent Supreme Court of Mississippi case, Little v. City of Jackson, 375 So. 2d 1031, U.S. cert. den. (Miss. - 1979). In the Little case, the employee was not given the full seven days to respond to the charge against him which the internal regulations called for, thus the court concluded that the

employee's due process rights had been violated. However again because of a failure of the appellant to timely raise the issue, the issue was deemed waived by the court.

In the instant case the appellants have timely raised this issue at every step of the procedure. Thus the reasoning of this court in Service v. Dulles, Vitarelli v. Seaton and Arnett, supra, and concurred in by the Federal Court of Appeals, District of Columbia and the Supreme Court of Mississippi would clearly dictate a result different from that reached by the Ohio Supreme Court in the instant case.

C. CONCLUSION

The federal due process rights of the appellant employees which have been violated by the state employer in this

case are fundamental. The provision of notice and hearing are regarded as the essence of the due process clause. This court in Arnett, supra, stated that property rights protected by the Fifth and and Fourteenth Amendment can not be denied an individual by the government unless such a deprivation is accompanied by "minimum procedural safeguards, including some form of notice and a hearing".

The primacy of notice and hearing rights were also acknowledged by the court in Goss v. Lopez, 419 U.S. 4454 (1975) in which the court noted

> "At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing". 419 U.S. at 579.

The court went on to state that "[s]ince the hearing may occur almost immediately following the misconduct, it follows as a general rule notice and hearing should precede removal of the student from school". ID at 582 (emphasis added).

In the present case the appellant-employees were terminated from their jobs without benefits of any type of pre-termination conference. Certainly there can be no doubt that in the permanent loss of one's job an individual should be afforded the same constitutional protection enjoyed by a student who is suspended for less than ten days. The Seventh Circuit Court of Appeals in Muscare v. Quinn, supra, echoes this sentiment.

> As the Court has stated before and reaffirmed in Goss "many controversies have raged about the cryptic and abstract words of the due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be

> preceded by notice and opportunity for hearing appropriate to the nature of the case", Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950). In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake.

Therefore, because of the important federal question before the court and because the decision of the Ohio Supreme Court is in conflict with the prior decision of this court, the prior decision

of the federal courts of appeals and the court of last resort of other states, this court is respectfully urged to grant this writ.

Respectfully submitted,

John T. Conroy
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APPENDIX A
OPINION OF THE OHIO SUPREME COURT
June 25, 1980

PARFITT ET AL., APPELLEES, v.
COLUMBUS CORRECTIONAL FACILITY
ET AL., APPELLANTS.

[Cite as Parfitt v. Correctional Facility (1980), 62 Ohio St. 2d 434.]

Public employees - Removal from employment - Challenge - Employer-agency procedural rules - May not be asserted by employee, when - Not mandatory prerequisite to removal, when - R. C. 111.15.

1. In the absence of prejudice, a public employee in challenging his removal from employment may not assert the employer agency's procedural rules, unless that employee is a member of the class which the rule was intended to benefit.

2. A rule which does not clearly grant public employees procedural rights will not be presumed to be a mandatory prerequisite to removal actions against those employees if promulgated under R. C. 111.15.

PARFITT v. FACILITY.

Statement of Case

(No. 79-1531 - Decided June 24, 1980.)

APPEAL from the Court of Appeals for Franklin County. This action arises out of a strike by correctional officers and a licensed practical nurse (hereinafter "officers") at the Columbus Correctional Facility which began May 8, 1978. As a result of their activities during the strike, a number of officers were terminated from their employment for "neglect

of duty and/or failure of good behavior," effective May 9 or 10, 1978.

The officers have not contested the fact that proper procedures under R. C. 124.34 were followed in their terminations. In removing the officers, however, David R. McKeen, the superintendent at the facility, failed to give the officers notice of the reasons for their removals and an opportunity to participate in a conference with him prior to issuing the removal orders.

Ohio Adm. Code 5120-7-05 (C) (3) states in part:

"Prior to any suspension, reduction, or removal, the following procedure shall apply:

"(a) When the circumstances, gravity, or frequency of violations indicate that disciplinary action other than a written reprimand may be appropriate, the supervisor and/or the Personnel officer shall confer with the employee about the facts in the case in private. If the

employee is unavailable for a conference due to his participation in a work stoppage or has an unexcused absence of three consecutive days, an office conference is not required. In such cases, the employee shall be notified by mail of the reason(s) for discipline and given the opportunity for a conference within three (3) working days.

"(b) If, after conferring with the employee involved, if available, the supervisor and/or Personnel Officer decided that a suspension, reduction, or removal is warranted, they shall make a recommendation to the Appointing Authority. A record of the conference with the employee and the facts in the case shall be sent with the recommendation.***

"(c) The Appointing Authority shall review the record of the case. The final decision regarding what disciplinary action, if any, is appropriate shall be made made by the Appointing Authority."

The officers appealed their removals to the State Personnel Board of Review which, after a hearing, determined, among other things, that there was good cause for the removals and that the removals were not invalidated by the failure of the superintendent to follow the pro-

cedure enumerated in Ohio Adm. Code 5120-7-05. As a consequence, the board affirmed the removals.

The officers appealed, arguing that the removals should be invalidated due to the failure of the superintendent to follow the procedure delineated in Ohio Adm. Code 5120-7-05 requiring notice and conferences prior to removal. The Court of Common Pleas of Franklin County affirmed the decision of the board of review. Upon appeal, the Court of Appeals reversed and remanded the cause.

The cause is now before this court upon the allowance of a motion to certify the record.

MR. JOHN T. CONROY, MR. JOHN J. KERRIGAN and MR. DAVID JENKINS, for apellees.

MR. WILLIAM J. BROWN, attorney general, MR. B. DOUGLAS ANDERSON, MR. ROBERT P. SHERMAN and MR. LOREN L. BRAVERMAN, for appellants.

CELEBREZZE, C. J. The sole question before this court is whether the procedure delineated for removals of corrections officers in Ohio Adm. Code 5120-7-05 is a mandatory prerequisite for such removals.

Rules issued by administrative agencies pursuant to statutory authority have the force and effect of law. See Kroger Grocery & Baking Co. v. Glander (1948), 149 Ohio St. 120, 125; State, ex rel. Kildow, v. Indus. Comm. (1934), 128 Ohio St. 573, 580.

In cases such as the one at bar, however, an employee is challenging the actions of an agency by asserting the

failure of the agency to follow procedures it has imposed on itself by rule. In the absence of prejudice, a public employee in challenging his removal, from employment may not assert the employer-agency's procedural rules, unless that employee is a member of the class which the rule was intended to benefit.

It is extremely questionable whether these employees are among the intended beneficiaries of the rule. Although the rule arguably does provide an early opportunity for the employee to express his position, it can also be viewed as a procedure designed to enhance the fact finding process so that the appointing authority can render a proper decision in the matter.

There are two distinct provisions in the Revised Code for promulgating and filing agency rules. These are contained in R.C. Chapter 119 and in R. C. 111.15.

R. C. 119.02 states:

"Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in sections 119.01 to 119.13, inclusive, of the Revised Code, for the adoption, amendment or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule."

R. C. 119.01(C) states that for the purposes of R. C. Chapter 119:

"'Rule' means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, but it does not include regulations concerning internal management of the agency which do not affect private rights."

R. C. 111.15 provides and has provided for filing of rules with the Secretary of State and the Director of the Legislative Reference Bureau without following the procedures in R. C. Chapter 119. By its terms R. C. 111.15 does not apply to "rule" as that word is used in R. C. Chapter 119.

The Department of Rehabilitation and Correction promulgated and filed Ohio Adm. Code 5120-7-05 pursuant to R. C. 111.15. In so doing, the department indicated an intent to promulgate a rule concerning internal management that does not affect private rights. Promulgation of a procedural rule clearly intended to benefit employees might be held to provide mandatory jurisdictional procedures which employees could assert, even though promulgated pursuant to

R. C. 111.15. However, a rule which does not clearly grant public employees procedural rights such as Ohio Adm. Code 4120-7-05, will not be presumed to be a mandatory prerequisite to removal actions against those employees if promulgated under R. C. 111.15.

Even if the intent of the rule is not to benefit members of the class asserting the failure to follow the rule, a showing of prejudice in the failure to follow the rule will ordinarily invalidate the action. However, no prejudice has been shown in the case of the removal of the officers herein. No question is raised regarding the sufficiency of the evidence of misconduct and it is clear that David McKeen, the superintendent of the Columbus facility and the

appointing authority, had personal knowledge of the facts which led to the removals.

Appellees argue that even if the rule is not interpreted as a mandatory prerequisite to their removals under state administrative law, the procedure, in providing a pretermination hearing, is required under the Due Process Clause of the United States Constitution and Sections 1, 16, 19 of Article I of the Ohio Constitution. In Arnett v. Kennedy (1974), 416 U.S. 134, the United States Supreme Court made it clear that a pretermination hearing was not required under the Due Process Clause to remove federal civil service employees. In that case, the court approved of a procedure essentially the equivalent of the one provided to classified employees

in R. C. Chapter 124. There is no requirement, either direct or inferred, to grant a right to pretermination hearings such as those in Ohio Adm. Code 5120-7-05 under the Ohio Constitution's due course of law guarantee. The process under R. C. 124.34 provides adequate procedural safeguards to employees in the classified service.

The judgment of the Court of Appeals is reversed.

JUDGMENT REVERSED.

HERBERT, W. BROWN, P. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

APPENDIX B
OPINION OF THE OHIO COURT OF APPEALS,
TENTH DISTRICT
September 26, 1979

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

Gary A. Parfitt, Louis M. Thomas, et al.,

Plaintiffs - Appellants,

v.

Columbus Correctional Facility, State Personnel Board of Review,

Defendants - Appellees.

No. 79AP-197

D E C I S I O N
Rendered on September 25, 1979

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For Defendants-Appellees

REILLY, J.

This is an appeal from a judgment of the Court of Common Pleas, Franklin County, Ohio. The record shows that appellants, correction officers employed by the Columbus Correctional Facility, (hereinafter CCF), were removed May 10, 1978, from their positions for neglect of duty and failure of good behavior. Appellants appealed to the Personnel Board of Review, which affirmed the disciplinary actions in a two-to-one decision and order. Whereupon, an appeal was timely taken to the Court of Common Pleas, which confirmed the order of the board in the following entry:

> "Upon consideration of the record, the briefs and their oral arguments of the Parties, the Court finds that the Order of the State Personnel Board of Review in this appeal is supported by reliable,

> probative and substantial evidence and is in accordance with law. WHEREFORE, the Order of the State Personnel Board of Review is AFFIRMED and this appeal DISMISSED. Costs to Appellants."

The transcript definitely shows sufficient evidence to support the disciplinary infractions included in the removal orders. For instance, pickets began forming May 8, 1978, outside the CCF requiring the Superintendent to declare an emergency and to seek a temporary restraining order from the Court of Common Pleas. Appellants engaged in several acts of misconduct, involving intimidation, and they ignored the court's restraining order.

Moreover, the record includes, in the Personnel Board of Review's decision,

the following summary from the testimony of the CCF Superintendent, as follows:

> "On May 9, at 2:45 p.m., Superintendent McKeen testified that he ordered all guards to report to duty, and that many did not respond. He said that none of the appellants responded. On cross examination by counsel for appellants, Superintendent McKeen admitted the employees were not notified by mail of the reasons for discipline and given the opportunity for a conference within three working days as provided in paragraph (C) (3) (a) of Rule 4120-7-05 of the Ohio Department of Rehabilitation and Correction, Appellants' Exhibit No. 2. He also said that no employee had requested such a meeting. The Superintendent also said that all the appellants had been charged with neglect of duty. Counsel for the appellants then made a motion for disaffirmance of the re-

> moval orders for the reason that no conference had been afforded the appellants under the provisions of the above rule. This motion was taken under advisement by the board and no ruling made at that time."

The Board overruled the motion for disaffirmance of the removal orders based upon the failure to follow administrative regulation. The dissenting member, however, disagreed on this question and filed the following opinion for disaffirmance:

> "I dissent because the evidence shows that the Department of Rehabilitation and Correction failed to follow its own Rules in removing these employees. I agree with the majority that the strike was illegal, and I in no way condone the use of ballbats, vicious dogs, or threats while on the picket line.

> Such activities on the part of these pickets was reprehensible."

This appeal has been perfected, including the following assignment of error:

> "The termination of employees of the Department of Rehabilitation and Correction in violation of rules and regulations duly promulgated by the Department in accordance with the law, is violative of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution, and is reversible error."

There has not been an issue raised as to the sufficiency of the evidence in this case to support the removal orders and the decisions of the Board of Review as well as the Court of Common Pleas. Instead, appellants contend that the Board's order of affirmance is "not in

accordance with law." Specifically, they assert the Superintendent's failure to follow the procedures for disciplinary action established by the Director of the Department of Rehabilitation and Correction (hereinafter "Director" and "Department " respectively) within Rule 5120-7-05 of the Administrative Code invalidates their removals from state employment. Conversely, appellee contends that appellants were removed in accordance with law pursuant to R. C. 124.34 and that its conceded failure to abide by the administrative regulation does not affect the validity of the disciplinary actions.

The pertinent chapters of the Revised code and the Administrative code set forth a two-tier procedure, including preremoval and post-removal stages, for the removal of departmental classified

employees. R. C. 124., R. C. 5120., O.A.C. 5120-7. By statute, as well as by regulation, the Superintendent of each department institution is the appointing authority designated to appoint, discipline, and remove for cause employees of the respective facility. R. C. 5120.38; O.A.C. 5120-7-01(C)(1)(d). R. C. 51200.01 categorically and unequivocally requires that all duties conferred upon the department institutions by law or by order of the Director, must be performed under such rules and regulations as the latter shall prescribe. Rule 5120-7-01 (C)(10), initiated by the Director under R. C. 5120.01, reads:

> "(10) The procedures for disciplinary action shall be governed by Administrative Regulations 5120-7-03, 5120-7-04, 5120-7-05, 51207-06."

Rule 5120-7-05, designated "Employee discipline ," includes under subsections (A) and (B), the following articulated purpose and policy"

> "(A) Purpose: It is the purpose of this Administrative Regulation to set forth the grounds and procedures for discipline of employees of the Department of Rehabilitation and Correction.
>
> "(B) Policy: Whenever it becomes necessary to discipline an employee it is the policy of the Department of Rehabilitation and Correction to use progressive discipline when circumstances permit. However, it must be recognized that there are certain violations of the rules which are of such seriousness that a single act may warrant dismissal. The attached rules of Conduct shall be applicable under this Administrative Regulation."

When the contemplated disciplinary action is either suspension or removal,

subsection (C)(3) of the same rule is applicable:

> "(3) Prior to any suspension, reduction, or removal, the following procedure shall apply: "(a) When the circumstances, gravity, or frequency of violations indicate that disciplinary action other than a written reprimand may be appropriate, the supervisor and/or the personnel Officer shall confer with the employee about the facts in the case in private. If the employee is unavailable for a conference due to is participation in a work stoppage or has an unexcused absence of three consecutive days, an office conference is not required. In such cases, the employee shall be notified by mail of the reason(s) for discipline and given the opportunity for a conference within three (3) working days. "(b) If, after conferring with the employee involved, if available, the supervisor and/or Personnel Officer

> decided that a suspension, reduction, or removal is warranted, they shall make a recommendation to the Appointing Authority. A record of the conference with the employee and the facts in the case shall be sent with the recommendation. A written reprimand may be handled as stated in paragraphs (c) and (d) above.
>
> "(c) The Appointing Authority shall review the record of the case. the final decision regarding what disciplinary action, if any, is appropriate shall be made by the Appointing Authority."

The appeal procedure to the Personnel Board of Review is only applicable once the decision of the appointing authority is rendered. (R. C. 124.34.) Appellee contends the sole purpose of the conference procedure is to enable the appointing authority through his subordinates, to assemble enough facts

for an informed decision on the appropriate disciplinary action in each case. Appellee also asserts that a conference was unnecessary in appellants' cases because the Superintendent had sufficient personal knowledge of the requisite facts to make a decision. Futhermore, appellee argues that the applicable regulations are statutorily limited to facilitate internal management of department institutions, and do not confer any substantive rights upon department employees. (Note appellee's brief, pages 67.) This rationale was accepted by the trial court, which quoted from the majority opinion of the Personnel Board of Review, as follows:

> "We do not believe that this procedural provision conferred any substantive rights upon the appellants of such a nature as to

> render void their removal. Section 124.34 of the Ohio Revised Code provides an appeal and an appeal (sic) and an opportunity for a full hearing before the State Personnel Board of Review, and, thus, the appellants are given the full protection of due process of law as guaranteed by the Ohio and Federal constitution. We do not believe that this additional procedure adopted by the Director of Rehabilitation and Correction was intended to or should operate to give appellants a substantive right and that it was only intended to be a rule of procedure and that failure to follow such procedure could be subject to disciplinary action by the Director of the Department of Rehabilitation and Correction. See In re Therklidsen, 54 Ohio App. 2d. 195 (1977). The motion of counsel for the appellants is therefore found not to be well taken and overruled."

At any rate, the fundamental issue is whether the regulation is intended to

serve a valid and functional purpose; and whether not following its provisions on a selective or discretionary basis will substantially detract from its effectiveness. As above noted, the policy of the regulation is the utilization of the progressive disciplinary procedures when circumstances permit. (O.A.C. 5120-7-05(B0, supra.) This involves more that the mere gathering of facts as a purpose of a conference with employees. Such conference allows employees the opportunity to present their side of the dispute, whatever it may include. In addition, the waiting period of up to three days functions as a "cooling off" time, during which tempers and emotions will hopefully subside and a spirit of reason and compromise emerge.

Although the appeals procedure in R. C. 124.34 definitely meets the mandates of legal due process, its availability to appellants is not a valid reason for appellees' failure to apply the correct pre-removal procedures. The appeal is effective only when the positions of the respective parties are irreconcilable and the appointing authority has committed itself to the decision to remove the employee. This does not replace the informal reconciliation conference required by the regulations. The record indicates that the removal actions would have been inevitable notwithstanding any conference. The difficulty is that it is not actually the issue in this appeal, because when confronted with the issue of the regulation, it is necessary that it be followed.

It is noteworthy that the sentiments of this court are in accord with the dissenting opinion with regard to appellants' deplorable conduct. Nonetheless, we are constrained to recognize the regulation which existed at the time and was applicable to all concerned. Accordingly, appellants' assignment of error must be considered well taken and is sustained.

The judgment of the trial court is reversed, and this cause is remanded for further proceeding consistent with this decision and in accordance with law.

REVERSED AND REMANDED.

STRAUSBAUGH, P.J., and McCORMAC, J., concur.

APPENDIX C
OPINION OF THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
February 16, 1979

COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

GARY A. PARFITT, et al :
Plaintiffs
vs. :
COLUMBUS CORRECTIONAL FACILITY et al : Case No. 78-CV-07-3130
Defendants :

D E C I S I O N

Rendered this 25th day of JANUARY, 1979.

SHOEMAKER, J.

This is an appeal from the order of the State Personnel Board of Review which upheld the removal by the appointing authority of all of the appellants.

This appeal is based on the following citations of error:

That the Order of the Personnel Board of Review was not supported by re-

liable, probative, and substantial evidence; nor is it in accordance with law.

The Board found and the record clearly supports the conclusion that the Appellants were engaged in a work stoppage at the Columbus Correctional Facility on May 8, 1978, and/or May 9, 1978. The action of the Appellants created an emergency situation at the Columbus Correctional Facility and Judge Paul Martin of this court issued a temporary restraining order restraining all employees from engaging in a strike at the Columbus Correctional Facility and ordered an immediate return to work at their positions of employment at the Columbus Correctional Facility, and furthermore restrained them from disruption of the normal operations of the Columbus Correctional Facility in any way. ***** The Emergency situation

required that many employees work many hours of overtime to maintain control at the Columbus Correctional Facility.

On May 9, 1978, at 2:45 p.m., Superintendent McKeen ordered all guards to report for duty and none of the appellants responded.

On May 9, 1978, dismissal orders were compiled for the remaining employees, citing neglect of duty and failure of good behavior as the reasons for dismissal. No conferences were held either prior to or after the the firing of the appellants, nor were the appellants notified by mail of the reasons for the disciplinary action.

Appellants claim that in disciplinary actions brought by the Department of Correction and subject to the rules and regulation of that Department, an employ-

ee is entitled to receive written notification of the pendency of the charges brought against him and an opportunity for a conference or hearing with his Supervisor before he can lawfully be discharged.

Rule 5120-7-05 of the Ohio Correctional Department provides in part:

> (3) Prior to any suspension, reduction, or removal, the following procedure shall apply:
>
> (a) ...If the employee is unavailable for a conference due to his participation in a work stoppage or has an unexcused absence for three consecutive days, an office conference is not required. In such cases, the employee shall be notified by mail of the reasons for his discipline and given an opportunity for a conference within three (3) working days.

The Department in this case did not follow this administrative rule.

On this particular issue, the Board said,

"It is admitted that the letters were not sent to the Appellants, nor were any conferences held. The above section should also be read in context with the two following sections which read:

> (b) If, after conferring with the employee involved, if available, the supervisor and/or Personnel Officer decided that a suspension, reduction, or removal is warranted, they shall make a recommendation to the appointing authority. A record of the conference with the employee and the facts in the case shall be sent with the recommendation. A written reprimand may be handled as stated in paragraphs (c) and (d) above.
>
> (c) the Appointing authority shall review the record of the case. The final decision regarding what disciplinary action, if any, is appropriate shall be made by the Appointing Authority.

It would appear from the reading of the above sections that the conference

provided for would be handled by a supervisor and/or the Personnel officer so that the investigation into the facts of the case would not have to be done personally by the Appointing Officer. This would further assume that the Appointing Officer would not be personally familiar with the facts of the case. The facts in these cases are different in that the Appointing Authority, by his own testimony, showed that he was familiar with the facts and had personal knowledge of the facts of these cases and was in a position to make a decision without having to rely upon the investigation made by his subordinates. Since none of the appellants testified in their behalf or defended the charges against them except upon technical grounds, it did not appear that a conference would have resulted in

charges not being filed. There is no provision in the Rule which expressly or by implication provides that if the procedure is not followed this would be a grounds for dismissal of any charges brought.

We do not believe that this procedural provision conferred any substantive rights upon the appellants of such a nature as to render void their removal. Section 124.34 of the Ohio Revised Code provides an appeal and an opportunity for a full hearing before the State Personnel Board of Review, and, thus, the appellants are given the full protection of due process of law as guaranteed by the Ohio and Federal Constitutions. We do not believe that this additional procedure adopted by the Director of Rehabilitation and Correction was intended

to or should operate to give appellants a substantive right and that it was only intended to be a rule of procedure and that failure to follow such procedure could be subject to disciplinary action by the Director of the Department of Rehabilitation and Correction. See In re Therklidsen, 54 Ohio App. 2d. 195 (1977). The motion of counsel for the appellants is therefore found not to be well taken and overruled."

The dissenting member filed an opinion on this point which reads as follows:

DISSENTING OPINION

"I dissent because the evidence shows that the Department of Rehabilitation and Correction failed to follow its own Rules in removing these employees. I agree with the majority that the strike was illegal, and I in no way condone the use of ballbats, vicious dogs, or threats while on the picket line. Such activities on the part of these pickets was reprehensible."

The Appellants claim that they had the right to expect that the procedural safeguards promulgated under color of State law would be observed. Appellants cite many cases which hold that mandatory requirements of the statute cannot be ignored. In support of this position, Appellants cite the recent Supreme Court decision of Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) wherein that court held that students had some expectancy of continuing their education in a public school and declared as invalid a series of ten days suspensions given to students without the benefit of a hearing.

The Goss, supra, decision is distinguishable because the students never received any hearing, whereas in this case the appellants were entitled to a Section

124.34, Ohio Revised Code, hearing with a right of reinstatement without loss of pay.

R. C. 124.34 provides the grounds for removing a civil service employee. The appointing authority can neither enlarge or detract from these requirements. Thus, the Department of Rehabilitation and Correction is without authority to confer substantive rights upon an employee beyond those given him by R. C. 124.34. Therefore, the rule stating that pretermination conferences be held in disciplinary cases is at best procedural. Failure to comply with such rule does not void the action of the appointing authority. See In re Therklidsen, 54 Ohio App. 2d 195 (1977) where the court stated at page 199:

> "Accordingly, there being not a statutory provision requiring the discharge of defendant if he is not tried within 20 days after the filing of the complaint against him, there was no such right in defendant ..."

The Court held that Juv. R. 29 (A) was procedural only and conferred no substantive right upon an accused to have his case dismissed if he is not tried within the designated time.

Therefore, the decision of the Board is in accordance with law on this point.

Secondly, appellants claim a charge of neglect of duty does not fully and fairly inform an employee of the notice of charges brought against him as required by the department's rules and regulations where the charge fails to specify whether the offense is major or minor and cites simple failure to report for duty as the cause of removal. However,

in a similar fact pattern surrounding a work stoppage at the Lucasville Correctional Institution in the case of Denton v. Bashford, No. 1973 (July 12, 1976), the Court of Appeals of Scioto County considered removals arising from a strike by prison guards at the Southern Ohio Correctional Facility. The striking guards in that case were removed for neglect of duty, the order stating only that the employees did fail to report for duty on May 13th; and, on the 14th as well." The Court analyzed R. C. 124.34, and PL 25-03 (now Rule 123: 1-31-03 of the Director of the Department of Administrative Services) which provides as follows:

> (A) Any employee in the classified service who absents himself from duty habitually or for three or more successive duty days, without leave and without notice to his superior officer of the reasons for such

absence may be subject to removal for neglect of duty under provisions of Section 124.34, Ohio Revised Code.

(B) This rule does not require an appointing authority to initiate removal action if he determines it unwarranted nor does it preclude removal action for a shorter period of absence if the absence is of sufficient seriousness. The determination as to what constitutes a serious situation shall be made by the appointing authority of the agency concerned based upon evidence received from supervising subordinates or personal observations or knowledge."

The Court found as follows:

Removal of an employee, of the status enjoyed by appellees, is governed by Section 124.34 R. C. and PL25-03 Administrative Rules of the Director of Administrative Services.

From the clear intent of the framers of this rule, should the appointing authority find that an employee's absence, without justification, be of "sufficient seriousness" removals were issued citing Neglect of Duty in that: appelles did fail to report for duty on May 13th; and, on the 14th as well.

> It is of necessity that such reason for the charge of Neglect of Duty be stated in a brief but factual matter. State ex rel Brittain v. Board of Agriculture, 95 Ohio St. 276 (1917).
>
> Various cases have interpreted the variety and degree to which factual specifications must notify, by their content, the employee subject to such. See State ex rel. Dewald v. Matia, 125 Ohio St. 487 at 490, (1932), State, ex rel. Weber v. Eireck, 40 O.L.R. 145, at 147, 148, (1943) and State ex rel. vs. County Commissioners, 47 Ohio App. 1 (1933).
>
> Appellees were advised of the nature of the charges against them, supported by the dates specifically alleged to be absence days. It would be difficult to deny that the appellees were not given specific notice of the reasons for removal.

The Court further noted, at page 6, that:

> While striking, per se, is not a grounds for removal under R. C. 124.34, the fact that a work stoppage did occur is not determinative of the gounds for removal in this case. Striking was not shown to be the controlling criteria for discharge. Rather, a standard of personal conduct was established, whatever the motive behind the work

> stoppage, and thus activity resulting in the barring of entrances and exits, while neglecting a duty post was determined by the appellants, independently to be of "sufficient seriousness" to justify discharge under R. C. 124.34 and PL 35-05".

Therefore, this argument is without merit.

Thirdly, appellants claim a removal order signed by an illegally and improperly appointed Superintendent of a correctional facility is void and without effect under Ohio law. Appellants claim said appointment is invalid because the Superintendent was not appointed from the Classified Services in the Department of Rehabilitation and Correction.

This arugment is without merit because the Superintendent was at least a de facto officer. In State, ex rel

Paul v. Russel, 162 Ohio St. 254 (1954), the Court discussed the purpose of this doctrine:

> It has been said that the doctrine of de facto officers rests on the principal of protection to the interests of the public and third parties, not to protect or to vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid.

The Court, in State v. Staten, supra, held that actions of a de facto officer may not be challenged collaterally. Until a de facto officer is successfully challenged in a quo warranto proceeding, his actions are as valid as those of a de

jure officer. State v. Staten, supra; State, ex rel. Newman v. Jacobs, 17 Ohio St. 143, 153 (1848); State v. Gardner, 54 Ohio St 24 (1896); Steiss v. State, 103 Ohio St. 33 (1931); Greenlee v. Cole, 113 Ohio St. 585 (1925). Therefore, the authority of Superintendent McKeen to sign the removal orders may not be challenged by the Appellants.

Finally, the removal orders were signed not only by Superintendent McKeen but also by Director Denton. Pursuant to R. C. 5120.01 and R. C. 5120.38, the director is denominated the executive head of the Department of Rehabilitation with power to determine the number of employees for each institution. Accordingly, he is the ultimate appointing authority of all employees of the Department.

Personnel Board Rule 124-5-08(B) provides as follows:

> (B) The signature of the appointing authority on an order of a final action of an appointing authority shall be deemed to authentic signature of that authority unless objectioned to by the Appellant no later than the pretrial hearing or unless objectioned to by the Appellant in writing no later than three days prior to a record hearing where no prehearing had been scheduled. Failure to make such timely objection will be considered a waiver.

Because the appellants did not challenge Director Denton's signature within the prescribed time, they are deemed to have admitted its authenticity. Accordingly, they may not now claim that their orders of removal were not signed by the appointing authority.

Therefore, this Court finds that said order is supported by reliable, probative, and substantial evidence and is in accordance with law.

AFFIRMED.

Counsel shall prepare and file Judgment Entry in accordance with this decision and per court rule.

FRED J. SHOEMAKER, JUDGE

Appearances:

John T. Conroy
Attorney for Appellants

Larry R. Zingarelli
Loren L. Braverman
Robert P. Sherman
Assistants Attorney General
Attorneys for Appellees

APPENDIX D
DECISION, STATE PERSONNEL BOARD OF REVIEW
JUNE 21, 1978
STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

GARY A. PARFITT,	:	Case No. 78-REM-05-0503
LOUIS M. THOMAS,	:	Case No. 78-REM-05-0491
CHARLES H. STILWELL,	:	Case No. 78-REM-05-0492
LAWRENCE F. WEAVER,	:	Case No. 78-REM-05-0493
JAMES L. PURDUE,	:	Case No. 78-REM-05-0494
MICHAEL E. ACOSTA,	:	Case No. 78-REM-05-0495
ARTHUR J. SCHMOTZER,	:	Case No. 78-REM-05-0496
CHARLES R. SCOTT,	:	Case No. 78-REM-05-0498
LARRY G. PICKLESIMER,	:	Case No. 78-REM-05-0499
DANNY BALL,	:	Case No. 78-REM-05-0500
RICHARD K. WHITEHURST,	:	Case No. 78-REM-05-0501
ROBERT M. TATMAN,	:	Case No. 78-REM-05-0502
RONALD CHAPPELL,	:	Case No. 78-REM-05-0505
DONALD C. DOSS,	:	Case No. 78-REM-05-0506
THEODORE G. COOPER,	:	Case No. 78-REM-05-0540
LEROY JONES,	:	Case No. 78-REM-05-0541
CARLA M. MC MULLAN,	:	Case No. 78-REM-05-0544
LARRY J. MARTIN,	:	Case No. 78-REM-05-0545

APPELLANTS, :

v. :

COLUMBUS CORRECTIONAL FACILITY, :
APPELLEE. :

MAJORITY OPINION

These cases were consolidated for trial as one case and will be referred to hereafter as Gary A. Parfitt, et al., v. Columbus correctinal Facility, Case No. 78REM-05-0503. The cases were regularly assigned for hearing and heard by the full Board on June 5, 1978. The appellants were represented by John Kerrigan, Esquire, One Court Street, Boston, Massachusetts, legal counsel of the International Brotherhood of Corrections Officers.

The appellee was represented by Larry R. Zingarelli, Loren L. Braverman, and Robert P. Sherman, Assistant Attorn-

eys General. The appointing authority, David McKeen, was present and represented the Columbus Correctional Facility.

The following appellants were removed as Corrections Officers, effective May 9, 1978, for the reason that they had been guilty of "neglect of duty pursuant to Ohio Revised Code Section 124.34 in the following particulars, to wit: You failed to report to your regular assigned duty on May 8, 1978, and May 9, 1978, at the Columbus Correctional Facility": Parfitt, et al.

The remaining appellants were removed as Correction Officers, effective May 10, 1978, for the reason that they were charged as having "been guilty of neglect of duty and/or Failure of good Behavior in the following particulars, to wit: You failed to report to your regularly

assigned duties on May 8, 1978, and May 9, 1978, at the Columbus Correctional Facility and you were observed in front of said institution at a time or times that you were assigned to be on duty inside Columbus Correctional Facility. Also on May 8, 1978, and /or May 9, 1978, you disrupted or assisted in disrupting the normal operation of said Correctional facility blocking or attempting to intimidate other employees, and/or deliverymen and/or others from conducting their business at Columbus Correction Facility. This order of removal is in accordance with Sections 124.34 Ohio Revised Code."

It was stipulated by the counsel for the parties that the removal order had been signed by the appointing authority, that copies had been served upon the appellants, that copies had been filed with

the Department of Administrative Services, that copies had been filed with the State Personnel Board of Review, and that the appeals have been timely filed as to all the appellants with the exception of Appellant Leroy Jones. The appellant, Leroy Jones, admitted that he had received a copy of the removal order and the stipulation of jurisdiction was amended to include him.

The Superintendent of the Columbus Correctional Facility, David McKeen, testified that on May 8, 1978, at 4:30 a.m., pickets began forming across the street from the Columbus Correctional Facility. Employees were not crossing the picket lines. He declared an emergency, cancelled vacation leaves, and at 7:00 a.m. placed the Institution on 12 hour shifts and good days were cancelled. Routine medical treatments also

were cancelled for lack of help. He also testified that several officers at the Institution worked over 50 hours during this emergency period. He testified there were pickets at each entrance to the Columbus Correctional Facility, some with Doberman Pinscher dogs. Forty employees out of fifty-some employees did not report for duty on May 8. At 10:55 a.m. on May 8, he sent an employee to tell the employees who were at the gates of the Institution that their action was illegal and told them that they were to report to work. At 3:00 p.m., he went to the Ohio Attorney General's Office and then went tc Judge Paul Martin, Judge of the Common Pleas Court of Franklin County, Ohio, and obtained a temporary restraining order which was admitted as Appellee's Exhibit B. Such order restrained all employees from en-

gaging in a strike at the Columbus Correctional Facility, ordered an immediate return to work at their position of employment at the Columbus Correctional Facility, restrained them from disruption of the normal operations of the Columbus Correctional Facility in any way, and from committing any acts of violence or destruction or intimidation at, or in the vicinity of, the Columbus Correctional Facility. Copies of the restraining order were posted at all entrances of the Columbus Correctional Facility. The Superintendent sent a letter to the Director of the Department of Rehabilitation and Correction, admitted as Appellee's Exhibit A, advising him that he had declared a state of emergency. Superintendent McKeen testified that Appellant Richard Whitehurst was in the vicinity

of the entrances of the Columbus Correctional Facility and carrying two ballbats and stated that the action of the employees was authorized by the Washington Office of the International Brotherhood of Correctional Officers. Appellant Tatman was carrying a large stick.

On May 9, at 2;45 p.m., Superintendent McKeen testified that he ordered all guards to report to duty, and that many did not respond. He said that none of the appellants responded. On cross examination by counsel for appellants, Superintendent McKeen admitted the employees were not notified by mail of the reasons for discipline and given the opportunity for a conference within three working days as provided in paragraph (C)(3)(a) of Rule 5120-7-05 of the Ohio Department of Rehabilitation and Correction, Appellants' Exhibit No. 2. He also said that

no employee had requested such a meeting. The Superintendent also said that all of the appellants had been charged with neglect of duty. Counsel for the appellants then made a motion for disaffirmance of the removal orders for the reason that no conference had been afforded the appellants under the provisions of the above rule. This motion was taken under advisement by the Board and no ruling made at that time.

Mr. McKeen stated tht his position immediately before becoming Superintendent had been Inspector in the Department of Rehabilittion and Correction and that the position was an unclassified position. Counsel for appellants then made a motion for disaffirmance of the removal orders against the appellants for the reason that the appointment of Mr. McKeen

had not been from an employee in the classified service of the Department of Rehabilitation and Correcton as provided by paragraph (C) (1) (a) of Rule 5120-7-06 of the Department of Rehabilitaion and Correction, Appellants' Exhibit No. 2. This motion was taken under advisement. Counsel for appellants then moved for disaffirmance of the orders of removal against the appellants, for the reason that not all of the persons mentioned in the restraining order by the Common Pleas Court of Franklin County, Ohio, were removed. This motion was taken under advisement.

Mr. McKeen further testified that there were a total of 226 security positions and that 58 were supposed to report for duty on the first shift and that eight were outside the Institution at hospitals and one officer had been suspended. It was further testified that, on May 8 and

May 9, conditions were not normal at the hospital, that it was necessary to put the employees on a 12 hour basis, and that they were only able to operate with the aid of supervisory personnel. Further, that deliveries to the Institution had to be cancelled during this period.

Paul Guthrie, Personnel Officer of the Columbus Correctional Facility, testified that all of the appellants were required to be present on May 8 and 9, but none of them reported for duty. He further added that Appellant Acosta called in and said he would not cross the picket line.

The time record cards for each of the appellants had not clocked in on the day they were alleged, in the removal orders filed against them, not to have been on duty.

Captain Richard Ellison, a shift captain, was relief captain on the second

and third shifts on May 8 and 9. He identified the appellants as being outside the Facility at the entrances or in the vicinity of the entrances on the days on which they were alleged in the removal orders to have been absent from work. He and Officer Powell took polaroid pictures of the various appellants outside the Facility at the entrances or in the vicinity of the entrances on May 8 and 9. These were Appellee's Exhibit P-1 through P-57, inclusive, and were admitted into evidence. He further testified that the Facility was so short of guards it was necessary to call off-duty guards to report for duty. He further testified that Appellant Tatman waved off coal trucks and visitors, telling the, "Get out of here, we are on strike." He testified that Appellant Doss tried to prevent some of the guards from leaving the Facility

at the end of their duty. He further testified that Appellant Whitehurst had two baseball bats, and he gave one to Appellant Purdue. He further testified that Appellant Weaver made a statement in his presence that they would not let anyone in or out after this. He further testified that Guard Officer Howard had to force his way through the picket line in order to report for work. He said that the Fulton County Sheriff appeared at the Facility entrance with a load of prisoners and was waved off by some of the appellants and that the Sheriff made a second attempt and was successful in going through the picket lines and gaining admittance with his prisoners to the Facility.

The first witness for the appellants was Appellant Louis M. Thomas, a Correction Officer. He testified that on May 8

he was at the Ohio State University Hospital guarding a prisoner and had been on duty from 7:30 until 8:00, and he had been told by Lieutenant Hamilton that he could leave at 7:00 that evening. He said that on May 9 he had a doctor's appointment and did not report back because he was dismissed.

Appellants also called as a witness Carl E. Jones, a Correction Officer, who testified that he had not been harassed or intimidated when he went through the picket line to and from duty. John L. Weaver, a Correction Supervisor, also testified that he entered the Facility twice and left once on Monday, May 9, and was not harassed or intimidated.

The final witness for the appellants was Randy L. Brooks, a Correctional Officer, who tetified that he crossed the picket line without harassement or intim-

idation. The Appellant Louis Thomas was the only appellant who testified in his own behalf during his hearing.

Turning now to the counsel for appellants' three motions which were taken under advisement: The first of these motions was that the employees were not given notice by mail of the reasons for discipline and given the opportunity for a conference within three working days before being removed, as provided in paragraph (C) (3) (a) of Section 5120-7-05 of the Rules of the Department of Rehabilitation and Correction. The Rule read as follows:

> (3) Prior to any suspension, reduction, or removal, the following procedure shall apply:
>
> (a) When the circumstances, gravity, or frequency of violations indicate that disciplinary action other than a written reprimand may be

> appropriate, the supervisor and/or the Peronnel Officer shall confer with the employee about the facts in the case in private. If the employee is unavailable for a conference due to his participation in a work stoppage or has an unexcused absence of three consecutive days, an office conference is not required. In such cases, the employee shall be notified by mail of the reason(s) for discipline and given the opportunity for a conference within three (3) working days. (Underscoring added)

It is admitted that the letters were not sent to the appllants, nor were any conferences held. The above section should also be read in context with the two following sections which read:

> (b) If, after conferring with the employee involved, if available, the supervisor and/or Personnel Officer de-

cided that a suspension, reduction, or removal is warranted, they shall make a recommendation to the Appointing Authority. A record of the conference with the employee and the facts in the case shall be sent with the recommendation. A written reprimand may be handled as stated in Paragraphs (c) and (d) above.

(c) The Appointing Authority shall review the record of the case. The final decision regarding what disciplinary action, if any, is appropriate shall be made by the Appointing Authority.

It would appear from the reading of the above sections that the conference provided for would be handled by a supervisor and/or the Personnel Officer so that the investigation into the facts of

the case would not have to be done personally by the Appointing Officer. This would further assume that the Appointing Officer would not be personally familiar with the facts of the case. The facts in these cases are different in that the Appointing Authority, by his own testimony, showed that he was familiar with the facts and had personal knowledge of the facts of these cases and was in a position to make a decision without having to rely upon the investigation made by his subordinates. Since none of the appellants testified in their behalf or defended the charges against them except upon technical grounds, it does not appear that a conference would have resulted in charges not being filed. There is no provision in the Rule which expressly or by implication provides that if the procedure is

not followed this would be a grounds for dismissal of any charges brought.

We do not believe that this procedural provision conferred any substantive rights upon the appellants of such a nature as to render void their removal. Section 124.34 of the Ohio Revised Code provides an appeal and an opportunity for a full hearing before the State Personnel Board of Review, and, thus, the appellants are given the full protection of due process of law as guaranteed by the Ohio and Federal Constitutions. We do not believe that this additional procedure adopted by the Director of Rehabilitation and Correction was intended to or should operate to give appellants a substantive right and that it was only intended to be a rule of procedure and that that failure to follow such procedure could be subject to disciplinary action

by the Director of the Department of Rehabilitation and Correction. See In re Therklidsen, 54 Ohio App. 2d 195 (1977). The motion of counsel for the appellants is therefore found not to be well taken and overruled.

Counsel for the appellants' next motion for dismissal was on the basis that David McKeen, the Superintendent of the Columbus Correctional Facility who was the appointing authority, received his appointment illegally because he was not appointed from the classified service as provided in Section (C) (1) of Section 5120-7-06 of the Rules and Regulations of the Department of Rehabilitation and Correction, which provides as follows:

> The division Chiefs and Managing Officers shall be appointed from those employees in the Classified Services in the Department of Rehabilitaion and Correction.

It was subsequently brought out in testimony that immediately prior to being appointed to the positon of Superintendent of the Columbus Correctional Facility, David McKeen has been Inspector in the Department of Rehabilitation and Correction, which was an unclassified position. However, prior to that he held a classified positon in the Department of Rehabilitation and Correction and, in addition, still retained a backup civil service position which was the same position that he had had prior to being appointed as Inspector. It is apparent from reading this regulation that the purpose is to appoint from within the ranks and from persons who owe their appointment to merit and not to politics. The fact that the Superintendent has held an unclassified position immediately preceding his appointment to the position of

Superintendent should not disqualify him on that basis. Moreover, since McKeen was appointed by the Director of Rehabilitation and Correction, and has been performing the duties of his position, he at least is a de facto officer and as such his acts cannot be questioned in a proceeding such at this. As stated in 63 Am Jur 2d, pag 942:

> The general rule is that the acts of a de facto officer are valid as to third persons and the public until his title to office is adjudged insufficient, and such officer's authority may not be collaterally attacked or inquired into by third persons affected. The practical effect of the rule is that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent a failure of public justice. Third persons, from the nature

> of the case, cannot always investigate the right of one assuming to hold an important office.

If we were to accept the argument that Mr. McKeen's appointment was void, then by the same argument he would have no right to approve the payroll for payment of appellants' pay. It should also be noted that all of the removal orders were also signed by George F. Denton, Director of the Department of Rehabilitation and Correction. See Sections 5120.01 and 5120.38, Ohio Revised Code. The motion of counsel for appellants is therefore found not to be well taken and is overruled.

Counsel for appellant's third motion for dismissal was for the reason that not all of the correction officers named in the preliminary injunction were removed,

and that this was an unequal enforcement of the law. Insufficient facts were placed in evidence before the Board to make any such determination. The evidence does not disclose whether any of the other officers returned to work after being served with or having knowledge of the restraining order. Whether the others were placed in evidence before the Board to make any such determination. The evidence does not disclose whether any of the other officers returned to work after being served with or having knowledge of the restraining order. Whether the others were on the picket line, or what other circumstances may have been present to differentiate their circumstances from those of the appellants, is not in evidence. The Board finds this motion is not well taken and it is therefore overruled.

In passing, we might also mention that counsel for appellant cited no cases in support of any of his motions. We might also mention that recently this Board has been reversed by two courts for dismissing charges against employees on technical and procedural defects and placing too much emphasis on technical defects.

This brings us to consideration of the charges against Appellant Louis M. Thomas. He was alleged in the removal order to "have been guilty of neglect of duty and/or failure of good behavior in the following particulars, to wit: You failed to report to your regularly assigned duties on May 8, 1978, and May 9, 1978, at the Columbus Correctional Facility and you were observed in front of said institution at a time or times that you were assigned to be on duty inside

Columbus Correctional Facility. Also on May 8, 1978, and/or May 9, 1978, you disrupted or assisted in disrupting the normal operation of said Correctional Facility by blocking or attempting to block access to and from said Institution, and/or intimidated or attempted to intimidate other employees, and/or deliverymen, and/or others from conducting their business at Columbus Correctional Facility."

Mr. Thomas testified that on May 8 he was on duty for 12 hours until approximately 7:00 p.m. guarding a prisoner at the Ohio State University Hospital. This was not contraverted by the appointing authority, and therefore so much as the charges as charged are neglect of duty and/or failure of good behavior on May 8, 1978, they are found not to be proved, and the only remaining charges now pend-

ing against the appellant is neglect of duty and/or failure of good behavior on May 9, 1978. Mr. Thomas claimed that he was not on duty on May 9 because he had a doctor's appointment and that he was not able to work because of his physical condition. The uncontroverted evidence, however, was that Mr. Thomas was seen on May 9 outside the Facility near the entrances in the same area as the other guards. If he was well enough to have taken part in the activities outside the Facility, he should have been well enough to have been able to have performed his regularly assigned duties within the Institution.

In summary, the evidence discloses that there was a need for the employees to be on duty on the days in question. Their absence precipitated an emergency situation at the Facility. Their failure

to return to work as ordered by the Superintendent, and by restraining order of the Common Pleas Court of Franklin County , Ohio, without any reasonable excuse for not returning to work, and taking part in the activities outside the Institution, constitutes both neglect of duty and failure of good behavior. See George F. Denton, et al., Appellants v. Gary Bashford, et al., Appellees, Case No. 1073 Court of Appeals, Scioto County, Ohio, decided July 20, 1976. The attorney for the appellants claimed that the dismissals were selective, however, they failed to introduce any evidence to substantiate the allegation. The gravity of prison guards striking makes us take a second look at the technicality raised by the appellants' attorney--concerning a conference according to the rules--to depend on this technicality to win a case

and failing to put on appellants to explain their position leaves us with a void concerning the appellants' position in regard to the charges levelled against them borders on affrontry with the exception of Thomas Lewis.

The action of the appointing authority in removing all of the above named appellants from their positions as correction officers of the Columbus Correctional Facility is therefore AFFIRMED.

Schwenker - Aye
Avren - Aye
Earhart - No

Charles V. Schwenker
Chairman

DISSENTING OPINION

I dissent because the evidence shows that the Department of Rehabilitation and

Correction failed to follow its own Rules in removing these employees. I agree with the majority that the strike was illegal, and I in no way condone the use of ballbats, vicious dogs, or threats while on the picket line. Such activities on the part of these pickets was reprehensible.

Warren S. Earhart
Member

APPENDIX E
MANDATE OF THE OHIO SUPREME COURT
June 25, 1980

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 1980 TERM
City of Columbus. To wit: June 25, 1980

Gary A. Parfitt et al.,
Appellees, No. 79-1531

vs. MANDATE

Columbus Correctional Facility et al.,
Appellants.

To the Honorable COMMON PLEAS COURT
Within and for the County of FRANKLIN,
Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this case into execution:

Judgment of the Court of Appeals reversed for the reasons set forth in the opinion rendered herein.

THOMAS STARTZMAN,
Clerk

June 25, 1980

APPENDIX F
UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G
UNITED STATES CONSTITUTION

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in

each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or

elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion,

shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provision of this article.

APPENDIX H
OHIO REVISED CODE, SECTION 111.15

§111.15 [Adoption and filing of agency rules.]†

(A) No rule adopted by any board, commission, department, division, or bureau of the government of the state shall be effective until the tenth day after it is adopted and promulgated by the filing of one certified copy thereof in the office of the secretary of state and one certified copy thereof with the director of the legislative reference bureau. If both copies are not filed on the same day, the rule shall be effective on the tenth day after the day the later filing is made. A rule of an emergency nature necessary for the immediate preservation of the public peace, health, or safety, which shall state the reasons

for such necessity, shall become effective immediately upon being promulgated as provided in this section.

All rules filed in the office of the secretary of state pursuant to this section shall be recorded by the secretary of state under the title of the board, commission, department, division, or bureau adopting such rule and shall be numbered according to a numbering system devised by the director of the legislative reference bureau. Such rules shall be public records open to public inspection. All rules shall be published in the Ohio administrative code as provided by Chapter 103 of the Revised Code.

No rule filed pursuant to this section shall be amended except by a new rule, which new rule shall contain the entire rule as amended and shall rescind

the rule amended. Such amendatory rules shall be adopted and promulgated in the same manner as provided in this section for the adoption and promulgation of the rules which are thereby amended.

No rescission of any rule shall be effective until the tenth day after it is adopted and promulgated by filing one certified copy of the order of rescission of such rule with the secretary of state and one certified copy of the order of rescission of such rule with the director of the legislative reference bureau. If both copies are not filed on the same day, the rescission of such rule shall be effective on the tenth day after the day the later filing is made.

This section does not apply to any order respecting the duties of employees, or to any finding, or to any determina-

tion of a question of law or fact in a matter presented to such board, commission, department, division, or bureau. This section does not apply to a rule as defined in section 119.01 of the Revised Code.

(B) At least sixty days before a board, commission, department, division, or bureau of the government of the state adopts and promulgates a rule, amendment, or rescision under division (A) of this section, it shall file two copies of the full text of the proposed rule, amendment, or rule to be rescinded with the clerk of the senate, and the proposed rule, amendment, or rescission shall be subject to review under division (I) of section 119.03 of the Revised Code. This division does not apply to any of the following:

(1) A proposed rule, amendment, or rescission of an emergency nature;

(2) A rule, amendment, or rescission proposed under section 1125.23, 1155.18, 4123.29, 4123.34, 4123.341 [4123.34.1], 4123.342 [4123.34.2], 4123.391 [4123.39.1], 4123.40, 4123.411 [4123.44.1], or 4123.442 [4123.44.2] of the Revised Code;

(3) A proposed temporary rule, amendment, or rescission as defined in division (J) of section 119.01 of the Revised Code;

(4) A rule, amendment, or rescission proposed by an agency other than a board, commisssion, department, division, or bureau of the government of the state;

(5) A proposed rule, amendment, or rescission concerning the internal manage-

ment of a board, commission, department, division, or bureau of the government of the state;

(6) A rule, amendment, or rescission, proposed by the Ohio student loan commission, that complies with a federal law or rule, so long as the proposed rule, amendment, or rescission contains both of the following:

(a) A statement that it is proposed for the purpose of complying with a federal law or rule;

(b) A citation to the federal law or rule that requires compliance.

APPENDIX I
OHIO REVISED CODE, SECTIONS 119.01 and 119.03

119.01 Definitions.

As used in sections 119.01 to 119.13 of the Revised Code:

(A) "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the bureau of employment services, the civil service commission, the department of industrial relations, the department [of] liquor control, the department of taxation, the department of tax equalization, the industrial commission, the bureau of workers' compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commissison of the government of the state specifically made subject to sec-

tions 119.01 to 119.13 of the Revised Code Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or cancelling licenses. Sections 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission, nor do they apply to actions of the superintendent of banks, the superintendent of building and loan associations, and the superintendent of insurance in the taking possession of, and rehabilitation or liquidation of, the business and property of banks, building and loan associations, insurance companies, associations, reciprocal fraternal benefit societies, and bond investment companies, nor to any action that may be

taken by the superintendent of banks under sections 1113.02, 1113.05, 1125.10, and 1125.23 of the Revised Code, or by the superintendent of building and loan associations under section 1155.18 of the Revised Code. Sections 119.01 to 119.13 of the Revised code do not apply to actions of the industrial commission or the bureau of workers' compensation under sections 4123.01 to 4123.94 of the Revised Code with respect to all matters of adjudication, and to the actions of the the industrial commission and bureau of workers' compensation under sections 4123.29, 4123.34, 4123.341 [4123.34.1], 4123.342 [4123.34.2], 4123.391 [4123.39.1], 4123.40, 4123.411 [4123.41.1], 4123.44, 4123.441 [4123.44.1], and 4123.442 [4123.44.2] of the Revised Code. Sections

119.01 to 119.13 of the Revised Code do not apply to actions of the bureau of employment services except those relating to the adoption, amendment, or rescission of rules, and those relating to the issuance, suspension, revocation, or cancellation of licenses.

(B) "License" means any license, permit, certificate, commission, or charter issued by the agency.

(C) "Rule" means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, but it does not include regulations concerning internal management of the agency which do not affect private rights.

(D) "Adjudication" means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.

(E) "Hearing" means a public hearing by any agency in compliance with procedural safeguards afforded by sections 119.01 to 119.13 of the Revised Code.

(F) "Person" means a person, firm, corporation, association, or partnership.

(G) "Party" means the person whose interests are the subject of an adjudication by an agency.

(H) "Appeal" means the procedure by which a person aggrieved by a finding,

decision, order, or adjudication of any agency, invokes the jurisdiction of a court.

(I) "Rule-making agency" means any board, commission, department, division, or bureau of the government of the state that is required to file proposed rules, amendments, or rescissions under division (B) of section 11.15 of the Revised Code and any agency that is required to file proposed rules, amendments, or rescissions under division (B) of section 119.03 of the Revised Code. Rule-making agency does not include any state-supported college or university.

(J) "Temporary rule" means a rule, amendment, or rescission of a rule-making agency that contains the date on which the rule, amendment, or rescission shall expire, which date is not more than twelve months after the effective date of the rule. A temporary rule, amendment, or rescission does not include a rule, amendment, or rescission of an emergency nature as provided in section 111.15 or division (D) of section 119.03 of the Revised Code. §119.03 [Procedure for adoption, amendment, or rescission of rules.]†

Ohio Revised Code, Section 119.03

In the adoption, amendment, or rescission of any rule, an agency shall comply with the following procedure:

(A) Reasonable public notice shall be form and for the length of time the agency

given at least thirty days prior to the date set for a hearing, in the manner and determines and shall include:

(1) A statement of the agency's intention to consider adopting, amending, or rescinding a rule;

(2) A synopsis of the proposed rule, amendment, or rule to be rescinded or a general statement of the subject matter to which the proposed rule, amendment, or rescission relates;

(3) The date, time, and place of a hearing on the proposed action. In addition to public notice, the agency may give whatever other notice it considers necessary. Each agency shall adopt a rule setting forth in detail the method that the agency shall follow in giving public notice as to the adoption, amendment, or rescission of rules.

(B) The full text of the proposed rule, amendment, or rule to be rescinded shall be filed with the secretary of state, the director of the legislative reference bureau, the clerk of the senate, and the legislative clerk of the house of representatives at least thirty days prior to the date set for the hearing and shall be available at the office of the agency in printed or other legible form without charge to any person affected by the proposal. Failure to furnish the text to any person requesting it shall not invalidate any action of the agency in connection therewith.

(C) On the date and at the time and place designated in the notice, the agency shall conduct a public hearing at which any person affected by the proposed action of the agency may appear and be heard in

person, by his attorney, or both, may present his position, arguments, or contentions, orally or in writing, offer and examine witnesses, and present evidence tending to show that the proposed rule, amendment, or rescission, if adopted or effectuated, will be unreasonable or unlawful.

At the hearing, a stenographic record of the testimony and rulings on the admissibility shall be made at the expense of the agency.

In any hearing under this section, the agency may administer oaths or affirmations.

The agency shall pass upon the admissibility of evidence, but the person affected may at the time make objection to the ruling of the agency, and if the agency refuses to admit evidence, the

person offering the evidence shall make a proffer of the evidence, and the proffer shall be made a part of the record of the hearing.

(D) After complying with divisions (A), (B), and (C) of this section, the agency may issue an order adopting the proposed rule or the proposed amendment or rescission of the rule, consistent with the public notice and at that time shall designate the effective date of the rule, amendment, or rescission, which shall not be earlier than the tenth day after the rule, amendment, or rescission has been filed in its final form as provided in section 119.04 of the Revised Code.

(E) Prior to the effective date of a rule, amendment, or rescission, the agency shall make a reasonable effort to inform

those affected by the rule, amendment, or rescission and to have available for distribution to those requesting it the full text of the rule as adopted or as amended.

(F) If the governor, upon the request of an agency, determines that an emergency requires the immediate adoption, amendment, or rescission of a rule, he shall issue a written order, a copy of which shall be filed with both the secretary of state and the director of the legislative reference bureau, that the procedure prescribed by this section with respect to the adoption, amendment, or rescission of a specified rule is suspended and the agency may then adopt immediately the emergency rule, amendment, or rescission and it becomes effective on the date two certified copies of the rule, amendment, or rescission in final form and in com-

pliance with division (A) of section 119.04 of the Revised Code are filed with both the secretary of state and the director of the legislative reference bureau. If all copies are not filed on the same day, the emergency rule, amendment, or rescission shall be effective on the day on which the latest filing is made. The emergency rule, amendment, or rescission shall become invalid at the end of the sixtieth day it is in effect unless prior to the date the agency has complied with the procedure prescribed by this section for the adoption, amendment, and rescission of rules. If the agency fails to adopt the rule, amendment, or rescission in conformity with the procedure prescribed in this section within the sixty-day period, the emergency rule shall

become inoperative at the expiration of the sixty-day period.

(G) Rules adopted by an authority within the department of taxation or the bureau of employment services shall be effective without a hearing as provided by this section if the statutes pertaining to the agency specifically give a right of appeal to a higher authority within the agency or to a court, and also give the appellant a right to a hearing on the appeal. This division does not deny the right to file an action for declaratory judgment as provided in Chapter 2721. of the Revised Code from the decision of such higher authority within the agency.

APPENDIX J

OHIO REVISED CODE, SECTION 124.34

The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior or any other acts of

misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a compliant under section 102.06 of the Revised Code constitute a violation of Chapter 102. of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.

In any case of reduction, suspension of more than five working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor.

Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of

the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

In the case of the suspension for any period of time, or demotion, or removal of a chief of police or a chief of a fire department or any member of the police or fire department of a city or civil service township, the appointing authority shall furnish such chief or member of a department with a copy of the order of suspension, demotion, or removal, which order shall state the reasons therefor. Such order shall be filed with the municipal or civil service township civil service commission. Within ten days following the filing of such

order such chief or member of a department may file an appeal, in writing, with the municipal or civil service township civil service commission. In the event such an appeal is filed, the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority. An appeal on questions of law and fact may be had from the decision of the municipal or civil service township civil service commission to the court of common pleas in the county in which such city or civil service township is situated. Such appeal shall be taken within thirty days from the finding of the commission.

APPENDIX K
DEPARTMENT OF REHABILITATION AND CORRECTION
REGULATION 5 120-7-05

DEPARTMENT OF REHABILITATION AND CORRECTION

5120-7-05. Employee Discipline.

(A) Purpose: It is the purpose of this Administration Regulation to set forth the grounds and procedures for discipline of employees of the Department of Rehabilitation and Correction.

(B) Policy: Whenever it becomes necessary to discipline an employee it is the policy of the Department of Rehabilitation and Correction to use progressive discipline when circumstances permit. However, it must be recognized that there are certain violations of the rules which are of such seriousness that a single act

may warrant dismissal. The attached Rules of Conduct shall be applicable under this Administrative Regulation.

(C) Procedure:

(1) Employees in the Classified Service may be reprimanded in writing, suspended, reduced or removed for behaviors or acts which constitute one or more of the statutory grounds set forth in Section 124.34 of the Revised Code. These grounds are incompetency, inefficiency, dishonesty, drunkeness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the Administrative Rules of the State Director of Administrative Services, any

failure of good behavior, any act of malfeasance, misfeasance, or nonfeasance, or a finding of the Ethics Commission that the employee violated the State ethics law.

(2) Prior to any written reprimand, the following procedure shall apply:

(a) The supervisor shall discuss the facts of the case in private with the employee involved. The employee shall be given the opportunity to reply.

(b) If, after conferring with the employee, the supervisor decides that a written reprimand is the appropriate disciplinary action, a letter of reprimand stat-

ing the ground(s) for the reprimand and the facts in the case shall be prepared by the immediate supervisor. The supervisor shall sign the letter and forward the letter to the Appointing Authority for approval.

(c) If the letter of reprimand is approved by the Appointing Authority, he shall sign the letter and return it to the supervisor with a copy and an additional copy to the Personnel Officer. Otherwise, the letter shall be returned to the supervisor marked DISAPPROVED. No letter of

"disapproved" reprimand shall be issued to an employee unless it is approved and signed by the Appointing Authority.

(d) No later than ten (10) working days after the conference under Paragraph (b), the letter of reprimand shall be issued to the employee by the supervisor and/or Personnel Officer. The employee shall be requested to acknowledge receipt of the letter of reprimand. In the event of the employee's refusal to so acknowledge, the supervisor and/or Personnel Officer shall

note the employee's refusal to accept receipt of the letter of reprimand.

(e) A copy of the letter of reprimand acknowledging or noting delivery to the employee shall be placed in the employee's official Personnel File.

(f) If the employee disagrees with the facts contained in the written reprimand or wants to appeal the disciplinary action, he may do so through the Employee Grievance Procedure as provided in Administrative Regulation 5120-9-45.

(3) Prior to any suspension, reduction, or removal, the following pro-

cedure shall apply:

(a) When the circumstances, gravity, or frequency of violations indicate that disciplinary action other than a written reprimand may be appropriate, the supervisor and/or the Personnel Officer shall confer with the employee about the facts in the case in private. If the employee is unavailable for a conference due to his participation in a work stoppage or has an unexcused absence of three consecutive days, an office conference is not required. In such cases,

the employee shall be notified by mail of the reason(s) for discipline and given the opportunity for a conference within three (3) working days.

(b) If, after conferring with the employee involved, if available, the supervisor and/or personnel officer decide that a suspension, reduction or removal is warranted, they shall make a recommendation to the Appointing Authority. A record of the conference with the employee and the facts in the case shall be sent with the recommendation. A written reprimand

may be handled as stated in Paragraphs (c) and (d) above.

(c) The Appointing Authority shall review the record of the case. The final decision regarding what disciplinary action, if any, is appropriate shall be made by the Appointing Authority.

(d) If it is found that the employee should not be disciplined, all reference to the incident shall be expunged from the employee's Personnel File.

(e) If a suspension, reduction, or removal is warranted, the employee shall be noti-

fied in writing of the action, the effective date of the action, the statutory ground(s) and the supporting facts in the case. In all cases, the employee shall receive written notice of the disciplinary action. For a suspension of six working days or more, a reduction, or a removal, the notification shall be the employee's copy of the disciplinary order (ADM 4055). The employee shall be informed of his right to appeal to the Personnel Board of Review if the discipline is removal, reduction,

or suspension of six working days or more. If a suspension of five working days or less is given the employee shall be informed of the right to appeal through the employee Grievance Procedure pursuant to Administrative Regulation 5120-9-45. A disciplinary action is effective on or after the date of the decision to discipline the employee.

(f) The power of the Appointing Authority to suspend, reduce or remove an employee shall not be delegated. Although the Personnel Officer may prepare the

necessary documents for the disciplinary action, the Appointing Authority shall personally sign all forms and documents pertaining to the disciplinary action. In the event the Appointing Authority is unavailable to personally sign the documents, any other Appointing Authority having the power to discipline such employee, according to Administrative Regulation 5120-7-01, personally sign the necessary documents.

(g) For a suspension of five working days or less, the State Director of Administrative Services shall

be notified on a Personnel Action Form. The statutory ground(s) for his disciplinary action, specific acts or behaviors which support the ground(s) and previous disciplinary action the employee has received shall be included in a letter to the State Director of Administrative Services. A copy of the suspension letter sent to the employee shall be attached.

(h) In the case of a suspension of six or more working days, a reduction, or a removal, the disciplinary order (ADM 4055)

shall state the statutory ground(s) for the action and specific acts which support the basis for the action. Wherever possible, the exact time and place specific acts shall be given, along with the name of person(s) involved. If the statutory ground of incompetency or inefficiency is charged, the standards of performance by which proficiency or efficiency are judged is to be included on the order. The supporting information should be stated in a manner that fairly informs the employee of the charges against him.

(i) The disciplinary order (ADM 4055) shall be forwarded on the same date to the Personnel Board of Review and the Director of Administrative Services. It may not be filed before the date the employee is served his copy of the order.

(ii) A suspension of six (6) or more working days, a reduction, or a removal may be appealed by the employee in writing to the Personnel

Board of Review within ten (10) calendar days of the date on which the action was filed pursuant to Paragraph (i) above.

(iii) The Personnel Board of Review's copy of the disciplinary order shall be sent to the Personnel Board of Review by certified mail or be hand delivered by the Bureau of Personnel.

(4) Reassignment of an employee for his/her job assignment by an appropiate supervisor to a less

sensitive assignment is permissible, pending investigation, and hearing by the Appointing Authority.

(5) Nothing in the foregoing shall be construed to prohibit a supervisor from discussing problems with a subordinate or from advising a subordinate that his behavior may warrant disciplinary action if continued. No such discussion or advice shall be made part of the employee's personnel record unless in connection with disciplinary action under paragraph (1).

Effective Date November 12, 1976

Former Rule Number P-005

Promulgated under 111.15

Statutory Authority 124.34,
119.12,
5120.01

CERTIFIED

Date: December 21, 1976

Expires Indefinite

Signature: George F. Denton

APPENDIX L
RECORD OF PROCEEDINGS BEFORE THE STATE PERSONNEL BOARD OF REVIEW,
APPELLANT'S CLOSING ARGUMENT, PAGES 71-72

MR. KERRIGAN: Fine. And I would like to move now, Your Honor, that these cases be dismissed on the grounds of an illegal order of removal. The rules and regulations of the Department of Correction which the managing officer has testified that he goes by were not applied. The rules and regulations specifically point out that before an order of dismissal can be sent conferences must be allowed; if they are participating in an AWOL or an illegal strike then they're to receive a letter and given three days to have a conference before the order of dismissal and this was not complied with. And the Department of Corrections and Rehabilitation sent removal notices without complying with their own regula-

lations; and therefore these should be dismissed.

CHAIRMAN SCHWENKER: Mr. Kerrigan, the Board will take your motion under consideration but will pass on it at this time. We'll proceed with the rest of the cases.

APPENDIX M
RECORD OF PROCEEDINGS BEFORE THE STATE PERSONNEL BOARD OF REVIEW, APPELLANT'S CLOSING ARGUMENT, PAGES 241-250

CHAIRMAN SCHWENKER: Mr. Kerrigan.

MR. KERRIGAN: May it please the Board, Mr. Zinarelli, and colleagues. Correctional Officers at the Columbus Correctional Facility are not second class citizens. They're entitled to every right that everyone else is entitled to. And those rights are provided by the Constitution, the Fourteenth Amendment thereof, guarantees due process. And were they given due process?

According to the rules and regulations that Mr. McKeen, the Superintendent, told the individuals when he first met with them after his appointment in January that he was aware of and would go by, call for, call before a dismissal,

that there be a conference.

His own testimony indicates that there was not a conference. The rules and regulations call for, before there be a dismissal order sent, that there be a conference by the supervisor and/or a private conference by the supervisor and/or the personnel director. After the conference, the recommendation be sent to the managing authority to make his decision.

The evidence clearly shows from the mouth of the Superintendent that there was no such conference. The rules, if you read them carefully, show if someone is participating in an illegal strike and/or absence, then notice is sent to them and they're given three days. No notice, again,through the mouth of Mr. McKeen, was sent to these particular

individuals affording them the opportunity of a hearing. They were denied their due process. It's just as simple as that.

Also the rule and regulations -- now, my brother has made some concerns that there were people who were warned on the eighth and ninth three times. And then even after these three warnings they didn't behave; and so, of course, we dismissed them after three warnings. But, gentlemen, if you remember clearly, the personnel director, Mr. Guthrie, testifying that there were some of these people fired on the eighth. So how do you give three warnings extending into the ninth if you fire them on the eighth.

But he couldn't segregate the people that he fired. Of course, he could segregate the -- he could remember the union president, Mr. Whitehurst and he

could remember a steward, Mr. Tatman. But then his memory started failing him. And I'm certain if I went down the executive board members of that particular union, they would have been fired on the eighth, too.

Due process is an important thing, even almost as important as warnings.

Now, the specific charges, this gentleman appeared before them after being appointed by his niece's uncle last January, and - you can't object during cross-examination.

MR. ZINGARELLI: I have to object to that one. Superintendent McKeen is not related to Director Denton. That's a nasty rumor which has been flying about. It's just not true. I'm sorry that I objected.

CHAIRMAN SCHWENKER: Mr. Zingarelli-

MR. KERRIGAN: I'll withdraw it.

CHAIRMAN SCHWENKER: -- you'll have a chance to rebut that if necessary.

MR. ZINGARELLI: Thank you.

CHAIRMAN SCHWENKER: Don't interrupt counsel.

MR. KERRIGAN: When he was appointed by Mr. Denton, said that he knew the rules and would go by them. Now, there are specific charges, gentlemen, and it's plainly pointed out in Exhibit No. 2 on actions that they can be charged with. There's a specific charge of taking place, taking part in an illegal strike. That charge is number 11 and was not used. There is a specific charge for AWOL. That was not used even though the time cards indicate that they were AWOL. There was a catchall, a catchall used, that was neglect of duty.

Now, catchalls are put in there when a specific charge is not available. But

a specific charge was available in this case. Six of these individuals are only charged with neglect of duty. And I strongly object to any evidence that went in on anything else other than their not, other than something pertaining to neglect of duty.

Their charges, if you examine them, indicate that neglect of duty comes in two particular items, either major or minor. In the notice to them there was no clarification whether this was a major or a minor situation. Your rules and regulations indicate that it must be specific whenever possible point out the time, the persons involved, and what happened. And I say that it is not specific enough to stand up. This is all due process that these people were deprived of. Specific charges ignored, conference

that was required under due process not complied with, charged with catchalls when there were -- when the action was to be properly brought, specific charges were available to them and they neglected to do it.

They talked about -- my brother talked about guards that had to work 50 hours. There's no evidence of the guards having to work 50 hours. There was evidence that a captain worked 50 hours, that's it. There was -- there was nobody brought in to say personally that he was harassed or intimidated by crossing the picket line. There was three individuals brought in by the Appellants indicating that they went through the line and were not harassed.

Now, getting back to the point of Appellant's Exhibit No. 3, we talked about classified and unclassified

employees and whether or not Mr. McKeen was properly, is properly the superintendent. And if you find that his signature on the notices of dismissals was illegal and therefore he didn't have the authority to sign it, and therefore the case should be dismissed. And we made a motion on that.

And my brother talks about -- well, he did have a backup classified position. And I'm sure he probably did. But that isn't what the rules and regulations say if you carefully examine it. It says that someone appointed to the position of managing officer, must come from a classified list. And he indicates to you the position that he had just prior to being appointed managing officer of the Columbia -- Columbus Correctional Facility was some type of a supervisor of inmate grievances, an unclassified position.

So we have here Mr. Denton appointing someone from the unclassified, an unclassified position to another unclassified position. And the rules and regulations of the Department of Corrections which you have before you, Appellant's Exhibit No. 3, clearly show that that cannot happen.

This is a serious charge for these gentlemen are accused of. And certainly all of the due process due them should be given to them. Mr. Thomas, one particular case, testified before you that he worked on a date that he was charged with neglect of duty. And that has not been contested, that he worked 12 hours that day. The following day he had an excuse from a doctor and the personnel manager has indicated to you that he spoke with the doctor and the doctor indicated to him, yes, I treated him on

that day and in my opinion he was unable to go to work. These are two days, the two days that he's charged with neglect of duty and conduct unbecoming a correctional officer, or somewhat such. Failure of good behavior. One day he worked. Was that failure of good behavior? The second day he was under a doctor's care. Is that failure of good behavior or is that neglect of duty?

Summing up, correctional officers are entitled to their due process. They were given no due process in this case, number one.

Number two, it is the contention of the Appellants that the managing officer is illegally appointed and therefore did not have the authority to sign the notice.

Number three, six of these gentlemen

were only charged with failure -- I'm sorry, with neglect of duty. Any evidence of anything else should be excluded in their behalf. The other, the other gentlemen and lady involved were charged with neglect of duty and failure of good behavior. And I indicate that it is not specific. It is two catchalls, two catchalls, when in reality if they did take part in an illegal strike, why weren't they charged according to the rules and regulations of the Department of Corrections and Rehabilitation for taking part in that; it was available to them.

And why -- and since when is being absent, according to their rules and regulations, neglect of duty? Certainly only it exceeds three days or a period of four days within 90 days, according to

their rules and regulations. So they had those avenues open to them, and did not take part in them. And there's -- and also remember, gentlemen, that some of these people were fired, and we can't, and it's been through their witness, on the eighth. And I submit to you that they were all fired on the eighth. And I submit to you that they were all fired on the eighth. And I submit to you that their due process was excluded. And I would also -- and I would recommend for your reading an Ohio case, a 1975 United States Supreme Case, Supreme Court case, Goss versus Lopez, decided on January 22, 1975. And this concerns school children in Ohio who were suspended without a hearing. And the Supreme Court threw out the suspension because they were not afforded their due process and were not

given a hearing. And these gentlemen fall into that same category and have a lot to lose, their jobs. They were not afforded their due process, they were not given a conference as was pointed down.

There's another Supreme Court case, came down in the same week, which indicates not only did students who were not afforded their due process reinstated, but that the board, the school board that threw them down had to pay monetary damages to them.

Putting it altogether, catchall phrases when specific charges are available should not be allowed to be used in a dismissal. And I would say after weighing all the evidence, after checking the due process, and even in the proving of the case, what officer came before you and indicated that he was harassed or intimidated? There was -- there was

a captain policing his -- strike that.

There was a captain that indicated some things that he had seen. He even wanted to tell you about a conversation that he saw at a distance picture.

Putting it all together, I don't feel that the correctional facility has proved their case and that these gentlemen and lady should be sent back to work.

Thank you.

APPENDIX N
BRIEF OF APPELLANT
COMMON PLEAS COURT, FRANKLIN COUNTY, OHIO

COURT OF COMMON PLEAS

(B) Appellants were entitled to conferences as a matter of federal constitutional law. It may also be argued that the removals in the case before us violated even the most basic of federal constitutional guarantees. While the Board and the Department may argue that there is no federal constitutional right for the continuation of these appellants in state employment, it must be suggested that this argument misses the point of the appellants objection to their removal. Apellants argue that they, as state employees, have a property interest in their employment which gives them the expectation that they will be aforded the procedural requirements promulgated by

state regulations. Connell v. Higginbotham, 403 U.S. 207, 91 S. Ct. 1772, 29 LEd 2d 418 (1971), Wiseman v. Updegraff, 344 U.S. 183, 191-192, 73 S. Ct. 215, 28-219, 97 LEd 2d 216 (1953).

Thus, on the basis of state law, the appellants argue that they had the expectation that the procedural safeguards promulgated under color of state law, would be observed.

The Due Process Clause also forbids arbitrary deprivations of liberty, where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him. Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L.Ed. 2d151 (1971).

In assessing the degree of due process to be afforded, it must be recognized that a hearing before the firing was required under the facts of the case now

before us. "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 305, 294, 34 S. Ct. 779, 783, 58 L. Ed. 1363 (1914). At the very minimum, therefore, it must be argued that the appellants were entitled to some type of notice and some type of hearing. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale 1 Wall. 223, 233, 17 L. Ed 725 (1864).

Perhaps the leading case in the area of the construction of degree of notice and hearing to be afforded under Ohio statutes is the recent Supreme Court decision of Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). The Court, concluding that students had

some expectancy of continuing their education in a public school, declared as invalid a series of 10-day suspensions given to students without the benefit of a hearing. The Court there noted,

> "At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing." 419 U.S. at page 579.

The Court went on to state that "(s)ince the hearing may occur almost immediately following the misconduct, it follows as a general rule notice and hearing should precede removal of the student from school.

In the present case the plaintiffs were terminated from their jobs without benefit of any hearing whatsoever. Can there be any doubt that in the permanent loss of one's job an individual should be afforded the same constitutional protec-

tion enjoyed by a student who is suspended for less than ten days? The appellants respectfully submit that this question can only be answered in the affirmative.

The appellants therefore argue that based on Ohio precedent they were clearly entitled to notice and hearing under the facts of this case. Case law has been developed which indicates that the mandatory requirements set forth in a municipal or departmental regulation must be observed in order for a removal to be effective.

Additionally, appellants argue that they were fired without notice or hearing.

APPENDIX O
Brief of Appellant, pages 18-24
Court of Appeals, Tenth Disrict

B. Pre-termination conferences were required as a matter of federal constitutional law and the failure to provide them voids the subsequent removals.

It may also be argued that the removals in the case before us violated the most basic of federal constitutional guarantees. While the Board and the Department may argue that there is no federal constitutional right for the continuation of these Appellants in state employment, it must be suggested that this argument misses the point of the appellants' objection to their removal.

In sum appellants argue that they had a valid expectancy that the Rules and Regulatons of the Department promulgated pursuant to the Administrative Procedures

Act would be adhered to in any adverse action brought against them, and that the Department's failure to follow the law has infringed upon their property and liberty interests guaranteed by the Constitution. Goss v. Lopez, 419 U.S. 565, (1975); Amendment V and XIV, U.S. Constitution.

Perhaps the leading case in the area of notice and hearing to be afforded under Ohio statutes is the recent Supreme Court decision of Goss v. Lopez, supra. The Court, concluding that students had some expectancy of continuing their education in a public school, declared as invalid a series of 10-day suspensions given to students without the benefit of a hearing. The Court there noted,

> "At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and

> afforded some kind of hearing." 419 U.S. at 579.

The Court went on to state that

> "(s)ince the hearing may occur almost immediately following the misconduct, it follows as a general rule notice and hearing should precede removal of the student from school." ID at 582. (emphasis added).

In the present case the plaintiffs were terminated from their jobs without benefit of any type pre-termination conference. Can there be any doubt that in the permanent loss of one's job an individual should be afforded the same constitutional protection enjoyed by a student who is suspended for less than ten days? The appellants respectfully affirmative.

While it may be argued by the state that appellants' due process guarantees were observed via the post termination hearing conducted by the Board, appellants suggest that under the facts of this

case, the state's argument does not hold. It has already been suggested earlier in this brief that the federal constitution does not require a pre-termination conference in all cases.[8/] Appellants do, however, maintain that the federal constitution does guarantee such a conference when a state regulation provides for one. It is clear, therefore, that the Appellants' possess a property interest in the operation of the Rules and Regulations; and that the interference with that expectancy is a violation of their due process rights.

8/ See Shumate v. State Personnel Board, supra, at page 15-16 of this brief.

Much case law is available to support the conclusion that a state agency's failure to follow its own regulations gives rise to a federal due process claim by a person adversely affected by the agency's action. Service v. Dulles supra.

In Weber v. Highway Commission of State of Montana, 333 F. Supp. 561 (D.C. Mont. 1971), regulations promulgated by the Highway Commission provided in cases of discharge of a permanent employee that he be given written notification of the proposed action fifteen days beforehand and that a discussion between the affected employee and his supervisor take place.[9/] The Civil Service regulations of the

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9/ The Regulations under discussion is set out fully in Appendix "A" to the courts decision. 333 F. Supp. at 565, 566.

state did not provide for such a conference. After being terminated without the requisite fifteen day notice or the required pretermination conference, the employee brought a cause of action in the federal court pursuant to 42 U.S.C. Section 1983 alleging that his federally protected rights were abridged by the state action.

The Court held, after a discussion of both state and federal law, that the discharge without a pre-termination conference violated the employee's "rights to due process under federal law" 333 F. Supp. at 564.

Similarly, in United States ex rel. Cushman v. Laird, 469 F. 2d 773 (2d Cir. 1972) an inductee into the armed services alleged that his due process rights were violated when the Selective Service violated its own regulations. The Court

in discussing the due process implications of a violation of government regulations stated,

> "These regulations consistent with the underlying statute, had the force and effect of law, and the officials governed by the regulations were without legal authority to ignore or violate them to the detriment of the interests of the applicant. This is a settled rule that has been settled in a wide variety of contxts. . ."469 F. 2d at 180.

It is also clear that in cases brought by illegally discharged federal employees the federal courts have accepted the principle that a discharge carried out in violation of a department regulation is violative of the Fifth Amendment to the federal constitution. See, for example, Cole v. United States, 171 Ct. Cl. 178 (1965).

In the specific context of a correctional officer's discharge in

violation of Rules and Regulations promulgated by the Department of Rehabilitation and Corrections it seems that no cases are available. However, there are a multitude of cases holding that the discipline of a prison inmate in violation of regulation promulgated by State Correctional Departments is a violation of the inmate's due process rights. Queen v. South Carolina Department of Corrections, 307 F. Supp. 841 (D.C. South Carolina 1970); United States ex rel. Reis v. Leppeg, 256 F. Supp. 881 (W.D. Vir. 1;966); Lathrop v. Brewer, 340 F. Supp. 873 (S.D. Iowa 1972); Duckett v. Ward, 458 F. Supp. 624 (S.D. N.Y. 19;78). The Court in Brewer, supra, stated simply; ". . . where such established procedural guarantees have been violated by prison officials, Courts have recognized a constitution claim justifying remedial

action." 458 F. Supp. at 627.

There is no doubt that Ohio Courts have recognized the existence of this standard of constitutional review. State ex rel. Trimble v. State Board of Cosmetology, 4 Ohio Op. 3d 447, 50 OS2d 283 (1977). The Court in that case stated;

> "To have a protected property interest in a benefit such as continued employment by a state agency, an individual must have more than an abstract need or desire for it or 'unilateral expectation of it.' He must, instead, have a legitimate claim of entitlement to it." 4 Ohio Op. 3d at 448, citing Board of Regents v. Roth, 408 U.S. 564, 577. (1972).

While in Trimble, supra, the Court found that while there were no rules or mutually explicit understandings that would support that Appellant's claim of entitlement to the benefit, the Court did recognize that a property interest in job security could evolve from contract or regulation. Appellants respectfully

suggest that the Rules and Regulations here provide for that expectancy and that the Rules and Regulations defined the terms and conditons of their continued employment and that they would be followed by the department. Appellants therefore argue that their removals, conducted in violation of these expectancies, is a violation of their due process rights.

APPENDIX P
Brief of Appellee, pages 24-28
Supreme Court of Ohio

D. PRE-TERMINATION CONFERENCES WERE REQUIRED AS A MATTER OF STATE AND FEDERAL CONSTITUTIONAL LAW AND THE FAILURE TO PROVIDE THEM VOIDS THE SUBSEQUENT REMOVALS.

It may also be argued that the removals in the case before us violated the most basic of state and federal constitutional guarantees. While the Board and the Department may argue that there is no federal constitutional right for the continuation of these Appellees in state employment, it must be suggested that this argument misses the point of the appellants' objection to their removal.

In sum appellees argue that they had a valid expectancy that the Rules and Regulations of the Department promulgated pursuant to the Administrative Procedures Act would be adhered to in any adverse

action brought against them, and that the Department's failure to follow the law has infringed upon their property and liberty interest guaranteed by the Constitution. Goss v. Lopez, 419 U.S. 565 (1975); Amendment V and XIV, U.S. Constitution.

Perhaps the leading case in the area of notice and hearing to be afforded under Ohio Statutes is the recent Supreme Court decision of Goss v. Lopez, supra. The Court, concluding that students had some expectancy of continuing their education in a public school, declared as invalid a series of 10-day suspensions given to students without the benefit of a hearing. The Court there noted,

> "At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing." 419 U.S. at 579.

The Court went on to state that "(s)ince the hearing may occur almost immediately following the misconduct, it follows as a general rule notice and hearing should precede removal of the student from school." ID at 582. (emphasis added).

In the present case the Appellees were terminated from their jobs without benefits of any type pre-termination conference. Can there be any doubt that in the permanent loss of one's job an individual should be afforded the same constitutional protection enjoyed by a student who is suspended for less than ten days? The appellants respectfully submit that this question can only be answered in the affirmative.

While it may be argued by the state that appellees' due process guarantees were observed via the post termination

hearing conducted by the Board, appellees suggest that under the facts of this case, the state's argument does not hold. It has already been suggested earlier in this brief that the federal constitution does not require a pre-termination conference in all cases.[7] Appellants do, however, maintain that the federal constitution does guarantee such a conference when a state regulation provides for one. It is clear, therefore, that the Appellees' possess a property interest in the operation of the Rules and Regulations; and that the interference with that expectancy is a violation of their due process rights.

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required pretermination conference, the employee brought a cause of action in the federal court pursuant to 42 U.S.C. Section 1983 alleging that his federally protected rights were abridged by the state action.

The Court held, after a discussion of both state and federal law, that the discharge without a pre-termination conference violated the employee's "rights to due process under federal law" 333 F. Supp. at 564.

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violated when the Selective Service violated its own regulations. The Court in discussing the due process implications of a violation of government regulations stated,

> "These regulations consistent with the underlying statute, had the force and effect of law, and the officials governed by the regulations were without legal authority to ignore or violate them to the detriment of the interests of the applicant. This is a settled rule that has been settled in a wide variety of contexts.." 470 F. 2d at 180.

It is also clear that in cases brought by illegally discharged federal employees the federal courts have accepted the principle that a discharge carried out in violation of a department regulation is violative of the Fifth Amendment to the federal constitution. See, for example, Cole v. United States, 171 Ct. Cl. 178 (1965). In the specific context

of a correctional officer's discharge in violation of Rules and Regulations promulgated by the Department of Rehabilitation and Corrections it seems that no cases are available. However, there are a multitude of cases holding that the discipline of a prison inmate in violation of regulation promulgated by State Correctional Departments is a violation of the inmate's due process rights. Queen v. South Carolina Department of Corrections, 307 F. Supp. 841 (D.C. South Carolina 1970); United States ex rel. Reis v. Leppeg, 256 F. Supp. 881 (W.D. Vir. 1966); Lathrop v. Brewer, 340 F. Supp. 873 (S.D. Iowa 1972); Duckett v. Ward, 458 F. Supp. 624 (S.D. N.Y. 1978). The Court in Brewer, supra, stated simply; ". . . where such established procedural guarantees have

been violated by prison officials, Courts have recognized a constitution claim justifying remedial action." 458 F. Supp. at 627.

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While in Trimble, supra, the Court found that while there were no rules or mutually explicity understandings that would support that Appellees' claim of

entitlement to the benefit, the Court did recognize that a property interest in job security could evolve from contract or regulation. Appellees respectfully suggest that the Rules and Regulations here provide for that expectancy and that the Rules and Regulations defined the terms and conditions of their continued employment and that they would be followed by the department. Appellees therefore argue that their removals, conducted in violation of these expectancies, is a violation of their due process rights.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

Case No. A-142

GARY A. PARFITT, et al.,
Petitioners,

v.

COLUMBUS CORRECTIONAL FACILITY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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Case No. A-142

GARY A. PARFITT, et al.,

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Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

1. The Supreme Court of Ohio held that the pre-termination procedures adopted by a maximum security prison were not a mandatory prerequisite to the removal of striking correction officers under state administrative law or the Due Process clause of the United States Constitution. Petitioners have requested this Court to determine if federal Due Process requires prison officials to accord these correction officers notice and hearing prior to discharge. This issue was not raised before the Ohio courts and cannot be decided at this stage of the proceedings by this Court. *Cardinale v. Lousiana,* 394 U.S. 437 (1969).

Petitioners have argued throughout the appellate levels of this case that the failure of Respondents to comply with an internal management rule providing for a pre-termination conference violated Due Process. This argument was based upon Petitioners' misconception that the striking employees

possessed a property interest in the operation of the rules and regulations of the Department of Rehabilitation and Correction. Petitioners have not argued to any Ohio court that Due Process required that a governmental employee conduct a pre-termination conference in the absence of a regulation granting such a hearing. Since this federal Due Process issue is before this Court for the first time, the Writ of Certiorari should not be granted.

2. Federal Due Process did not require that Petitioners be afforded a pre-termination hearing. Petitioners were removed from their positions because they engaged in an illegal work stoppage while serving as correction officers at a maximum security penal institution. The unrefuted evidence in the proceedings below demonstrated that Petitioners' conduct precipitated an "emergency situation" at the Columbus Correctional Facility. The governmental official responsible for preserving safety and security at the facility had no option but to remove the Petitioners immediately. His decision not to afford Petitioners a pre-termination opportunity to be heard is supported by a long line of decisions of this Court, the most recent of which is *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

3. The Supreme Court of Ohio held that under state administrative law, internal management disciplinary rules are not mandatory unless the employee is a member of the class which the rule was intended to benefit. Since the Departmental Rule in the present case did not clearly grant the Petitioners a right to a pre-termination conference pursuant to state law, the Departmental procedure would not be presumed to be a mandatory prerequisite to a removal action against an employee. This determination of the intent of the Rule by the Supreme Court of Ohio should not be disturbed by this Court. *Albertson v. Millard,* 345 U.S. 242 (1953).

Petitioners incorrectly argue that the internal management pre-termination procedure of Columbus Correctional Facility is a mandatory prerequisite to the removal of an employee pursuant to the Due Process clause of the United States Constitution. This argument is improper for it rests upon Petitioners' erroneous argument in the lower courts that a rule, in and of itself, may constitute a property interest. Respondents submit that Petitioners' "entitlement" was in their position of

employment and not in the operation of a rule. By engaging in an illegal state strike, Petitioners created an emergency situation at a maximum security prison. Their job entitlement was adequately protected during their impartial record hearing before the State Personnel Board of Review.

STATEMENT OF THE CASE

Petitioners were employed as correction officers by Columbus Correctional Facility,[1] a maximum security prison located in the city limits of Columbus, Ohio. This case arose when Petitioners engaged in a strike at the institution on May 8 and 9, 1978, and were removed from their positions in accordance with Ohio Civil Service Law.[2] The strike created an emergency situation at the institution requiring the Superintendent to take immediate measures to protect the safety of the surrounding community.[3]

Petitioners ignored demands from supervisors of the institution to return to work.[4] In addition, a temporary restraining order was issued by an Ohio court and posted at all entrances to the institution ordering Petitioners to cease the strike and to return to work immediately.[5] This Court order

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1. Hereinafter referred to as "institution."

2. Petitioners were removed pursuant to Section 124.34 of the Ohio Revised Code for neglect of duty and/or failure of good behavior. The full text of this statute is found at pages 144-149 of the Petitioners' Brief. References to the Appendix contained in Petitioners' Brief shall be designated "App. of P.".

3. The Superintendent declared an emergency and placed the institution on twelve hour shifts. Vacation leaves and days off were cancelled; routine medical treatments were postponed. (Record 41, hereinafter referred to as "R."). Several officers worked over fifty hours during this emergency. (R. 42). One thousand three hundred and fifty (1,350) inmates were housed at the institution during this time period. (R. 40).

4. The first notice was given at 10:55 a.m. on May 8, 1978, when the Superintendent directed two officials of the Department of Rehabilitation and Correction to tell Petitioners that their action was illegal and to return to work. (R. 44). The second notice to return to work was given by the Custody Deputy of the institution at 2:45 p.m. on May 9, 1978. (R. 49).

5. R. 45-46.

was also ignored. The Superintendent of the institution, responsible for removing the employees, had "personal knowledge"[6] of the facts which led to the dismissal of the Petitioners.

While engaging in their illegal strike, Petitioners were responsible for a number of acts of coercion and intimidation. The delivery of prisoners to the instituion was prevented or delayed.[7] Petitioners also obstructed coal trucks,[8] intimidated visitors,[9] and attempted to physically prevent other correction officers from leaving or entering the instituion.[10] As a show of force, some of the Petitioners carried bats, sticks,[11] or were observed with dogs in the vicinity of the institution.[12]

As held by the Supreme Court of Ohio, the Petitioners did not contest the fact that proper procedures under Ohio law[13] were followed in their terminations.[14] Nor did Petitioners question in the lower court the sufficiency of the evidence of their own misconduct before the administrative body that reviewed the orders of removal.[15] The Petitioners complaint is that the Superintendent of the institution during this emergency situation failed to give the striking employees notice of the reasons for their dismissals and an opportunity to participate in a pre-termination conference in accordance with Ohio Adm. Code 5120-7-05(C)(3).[16]

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6. *Parfitt v. Columbus Correctional Facility*, 62 Ohio St.2d 434, 438 –N.E.2d– (1980); App. of P. 52.

7. R. 196.

8. R. 178.

9. *Id.*

10. R. 166, 171, 173, 178, 181, 185.

11. R. 48, 183.

12. R. 170.

13. *See*, Ohio Rev. Code Sect. 124.34, App. of P. 144-149.

14. *Parfitt, supra*, n. 6, 62 Ohio St.2d at 435; App. of P. 45.

15. *Id.* at 438; App. of P. 51.

16. Hereinafter referred to as "Departmental Rule." The origin of this Departmental Rule as determined by the Supreme Court of Ohio is fully discussed, *infra*, note 35. The full text of this Rule is found at App. of P. 150-167.

The manner in which this case has been appealed as discussed in the Petition for Writ of Certiorari is accurate. Respondents dispute, however, Petitioners' assertion in the Statement of the Case that the federal question raised in the Petition (Question A, Part A) was properly raised in state court so as to give this Court jurisdiction to review the judgment of the Supreme Court of Ohio on Writ of Certiorari.

ARGUMENT

I.

THE FEDERAL CONSTITUTIONAL ISSUES RAISED BY PETITIONERS ARE NOT PROPERLY BEFORE THIS COURT.

A. PETITIONERS FAILED TO RAISE IN STATE COURT THE ISSUE AS TO WHETHER FEDERAL DUE PROCESS REQUIRES THAT THE SUPERINTENDENT OF A MAXIMUM SECURITY PRISON ACCORD STRIKING EMPLOYEES NOTICE AND AN OPPORTUNITY TO A PRETERMINATION HEARING.

It is a fundamental principle of law that the Supreme Court of the United States will not decide issues of law which were not previously raised in the lower state courts.[17] In the present case, one of the two questions that Petitioners request this Court to determine is whether federal due process requires that employees engaged in an illegal strike be accorded notice and hearing prior to discharge. Respondents submit that this issue was not presented to the Ohio Court of Appeals or the Supreme Court of Ohio and, therefore, should not be reviewed by the Supreme Court of the United States.

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17. *See, e.g., Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Petitioners have consistently argued in the lower courts that they had a "valid expectency[18]" that the rules and regulations of the Department of Rehabilitation and Correction would be followed and the failure of the Department to adhere to a rule violated due process.[19] Petitioners reasoned that the existence of the Rule, in and of itself, constituted a property right which could not be ignored by a state agency without violating due process.

Petitioners have not submitted to any Ohio court the argument that public employees have a due process right to pre-termination notice and hearing in the absence of a regulation granting such a right. Indeed, Petitioners conceded that the Federal Constitution did not require a pre-termination conference in all cases, but added that a conference was required when the rules of the Department provided for one.[20]

The decision of the Supreme Court of Ohio addressed the specific issue raised by Petitioners that adherence to the *procedure* adopted by the Department of Rehabilitation and Correction was not required under the Due Process clause of the United States Constitution. Petitioners failed to raise the issue as to whether a pre-termination conference was required in the absence of a regulation granting such a hearing. Further evidence indicating that the proposition of law contained in question A of the Petition was not raised before the Supreme Court of Ohio is gleaned through an examination of the Court's

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18. App. of P. 199.

19. The Brief of Petitioners in the Supreme Court of Ohio, stated: "Appellants do, however, maintain that the Federal Constitution does guarantee such a conference when a state regulation provides for one. It is clear, therefore, that the Appellees possess a property interest in the operation of the Rules and Regulations; and that the interference with that expectancy is a violation of their due process rights." App. of P. 202.

20. The Brief of Petitioners in the Supreme Court of Ohio, stated: "Appellees respectfully suggest the Rules and Regulations here provide for that expectancy and that the Rules and Regulations defined the terms and conditions of their continued employment and that they would be followed by the Department. Appellees, therefore, argue that their removals, conducted in violation of these expectancies, is a violation of their due process rights." App. of P. 208. Petitioners argument in the Ohio Court of Appeals was almost identical to the argument contained in the brief before the Supreme Court of Ohio. App. of P. 189-198.

syllabus. Under Ohio law, the syllabus of the Supreme Court states the relevant propositions of law for which the decision may be cited.[21] There is absolutely no reference to the Due Process issue found in the syllabus written by the Supreme Court of Ohio in *Parfitt v. Columbus Correctional Facility.*[22]

The syllabus clearly reveals that the decision of the Supreme Court of Ohio was based upon state administrative law and not federal Due Process.

Based upon the failure of the Petitioners to raise the Constitutional Due Process issue in the lower courts, it is respectfully submitted that this Court should not grant the Writ of Certiorari.

B. THE DECISION OF THE SUPREME COURT OF OHIO THAT FEDERAL DUE PROCESS DID NOT REQUIRE A PRE-TERMINATION HEARING IN THIS CASE COMPORTS FULLY WITH THE DECISIONS OF THIS COURT HOLDING THAT PRE-DEPRIVATION HEARINGS ARE NOT REQUIRED IN EMERGENCY SITUATIONS.

Respondents concede that the Petitioners had a protected property interest in continued public employment by virtue of Section 124.34 of the Ohio Revised Code[23] which provides that a classified civil service employee may not be removed except for cause. That same statute entitles an employee who is removed from employment to certain procedural safeguards, including a right to appeal his removal to an impartial tribunal and a right to a full evidentiary hearing within thirty days. Petitioners took advantage of the procedural safeguards provided, and have not questioned the adequacy of these post-termination procedures.[24] Rather, Petitioners contend that they were also

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21. *State v. Wilson,* 58 Ohio St.2d 52, 388 N.E.2d 745 (1979).

22. *supra,* n. 6.

23. App. of P. 144-149.

24. *Parfitt, supra,* n. 6, 62 Ohio St.2d at 435; App. of P. 44.

entitled to an opportunity to be heard prior to termination. It is clear from a long line of decisions of this Court that a pre-termination hearing was not constitutionally required in this case because Petitioners' conduct had caused an emergency situation at Columbus Correctional Facility.[25]

This Court has stated that Due Process "is not a technical conception with a fixed content unrelated to time, place, and circumstances",[26] but rather, "is flexible and calls for such procedural protections as the particular situation demands."[27] In *Mathews v. Eldridge,*[28] this Court announced a general formula to be applied in determining what process is due in a particular situation. What process is due depends upon the balance of three distinct factors: The private interest that will be affected, the risk of an erroneous deprivation, and the government's interest in summary action. Applying this formula to the particular facts in this case, a court would be compelled to conclude that the balance was overwhelming in favor of the State's interest.

The Petitioners' interest in this case was the continuation of their employment pending an evidentiary hearing, which under Ohio law was required to be held within thirty days from their notice of appeal. Petitioners' actual injury, however, would have been limited to a temporary interruption of income, since under Ohio law the Petitioners would have been entitled to back pay had they prevailed on the merits of their claim.[29]

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25. This Court has traditionally recognized that a pre-deprivation opportunity to be heard is not consitutionally required in emergency situations involving a countervailing governmental interest of overriding significance. *See, e.g., Goss v. Lopez,* 419 U.S. 565 (1975) (removal of students who are disrupting the academic process); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974) (ex parte seizure of yacht allegedly used for smuggling); *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950) (seizure of misbranded drugs); *Fahey v. Mallonee,* 332 U.S. 245 (1947) (emergency bank management); *Phillips v. Commissioner of Internal Revenue,* 283 U.S. 589 (1931) (effective tax collection); *Central Union Trust Co. v. Garvan,* 245 U.S. 554 (1921) (emergency action during wartime); *North American Cold Storage Co. v. City of Chicago,* 211 U.S. 306 (1908) (seizure of allegedly diseased poultry).

26. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961).

27. *Morrisey v. Brewer,* 408 U.S. 471, 481 (1972).

28. 424 U.S. 319, 335 (1976).

29. *Monaghan v. Richley,* 32 Ohio St.2d 190, 291 N.E.2d 462 (1972).

Thus, both the duration and the degree of any potentially wrongful deprivation of Petitioners' interest were minimal in this case.

In addition, the risk of an erroneous deprivation of Petitioners' interest was negligible. In this case, the governmental official responsible for removing the Petitioners "was familiar with the facts and had personal knowledge of the facts of these cases and was in a position to make a decision without having to rely upon the investigation made by his subordinates."[30] The State Personnel Board of Review expressly found that "[s] ince none of the [Petitioners] testified in their behalf or defended the charges against them except upon technical grounds, it does not appear that a [pre-termination] conference would have resulted in charges not being filed."[31] A pre-termination conference would, therefore, have been of little value.[32]

Balanced against the foregoing factors, the State's interest in protecting the safety of the public during an emergency was unquestionably overriding. The unrefuted evidence in the proceedings below showed that the Petitioners' illegal work stoppage precipitated an "emergency situation" at the Columbus Correctional Facility.[33] On the first day of the strike, only eighteen of the fifty-eight correction officers assigned to the institution reported for the first shift. One thousand three hundred fifty (1,350) inmates were housed at the instituion, a maximum security prison, during this emergency situation. The evidence presented in Petitioners' post-termination hearing showed that while engaging in their illegal strike, Petitioners were responsible for a number of acts of intimidation. At various times, Petitioners blocked entrances and prevented others from entering or leaving the facility. One correction officer had to force his way through the picket line in order to

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30. Decision of the State Personnel Board of Review, App. of P. 106. The Supreme Court of Ohio concurred that the Superintendent of Columbus Correctional Facility "had personal knowledge of the facts which led to the removals." *Parfitt, supra,* n. 6, 62 Ohio St.2d at 438; App. of P. 52.

31. Decision of the State Personnel Board of Review, App. of P. 106.

32. *See, Mackey v. Montrym,* 443 U.S. 1 (1979).

33. Decision of the State Personnel Board of Review, App. of P. 115.

report for work. A county sheriff sought admittance to the institution and was waived off by some of the Petitioners. Only after a second attempt did the sheriff gain admittance to the institution. Since it was conclusively determined in the proceedings below that the Petitioners' conduct precipitated an "emergency situation", the instant case falls well within the ambit of this Court's prior decisions holding that a pre-deprivation hearing is not constitutionally required in an emergency situation.[34]

Applying the *Eldridge* formula, a court could come to but one conclusion in the instant case. The State's interest in protecting a maximum security penal institution from serious disruption far outweighed the Petitioners' interest in avoiding a temporary interruption in income. Moreover, since the governmental official responsible for the Petitioners' discharge had personal knowledge of the precipitative facts, the risk of an erroneous deprivation of Petitioners' interest was virtually non-existent and additional pre-termination procedures would have had little value.

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34. Petitioners have asked this Court to consider numerous federal and state court decisions which have interpreted this Court's decision in ***Arnett v. Kennedy,*** 416 U.S. 134 (1974) to require notice and an opportunity to be heard prior to discharge. None of the cases cited by the Petitioners, however, involved an emergency situation analogous to that presented in this case.

Two of the cases cited by Petitioners did involve the removal of public employees for engaging in illegal strikes. In ***Rockwell v. Crestwood School District, Board of Education,*** 227 N.W.2d 736, 740 (Mich. 1975), app. dism. 427 U.S. 901 (1976), the Michigan Supreme Court concluded that, "a teacher, including a teacher on continuing tenure, who strikes in violation of [state law] may be disciplined without a prior hearing." The case is, therefore, supportive of Respondents' position. Petitioners also rely on ***Hortonville Education Association v. Hortonville Joint School District,*** 225 N.W.2d 658 (Wisc. 1975), cert. den. 427 U.S. 904 (1976). That case is distinguishable, however, in that there is nothing in the record therein to suggest that the strike precipitated an emergency situation.

II.

THE INTERNAL MANAGEMENT PROCEDURE OF A STATE AGENCY IS NOT MANDATORY AND DOES NOT VIOLATE DUE PROCESS WHEN NOT APPLIED.

THE PRE-TERMINATION PROCEDURES OF COLUMBUS CORRECTIONAL FACILITY WERE INTENDED TO PROVIDE THE SUPERINTENDENT WITH SUFFICIENT DISCIPLINARY INFORMATION PRIOR TO THE REMOVAL OF AN EMPLOYEE. THESE PROCEDURES ARE NOT A MANDATORY PREREQUISITE TO A DISCHARGE UNDER STATE ADMINISTRATIVE LAW AND DO NOT INVOLVE PRINCIPLES OF FEDERAL DUE PROCESS.

By an examination of state administrative law, the Supreme Court of Ohio determined that a Departmental Rule granting employees the opportunity to participate in a pre-termination conference was not a mandatory prerequisite to removal.[35] The Ohio Court stated that it was extremely questionable whether the striking employees were among the intended beneficiaries of the Departmental Rule, noting that the Rule could be viewed as a "procedure designed to enhance the fact finding process"[36] of the institution. The Court added that even if a rule was not intended to benefit members of the class asserting the failure to follow the rule, a showing of prejudice by the employee would ordinarily invalidate the removal action. No prejudice had been shown by the striking employees, however, and the orders of removal were affirmed.

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35. The Court reasoned that there were two distinct provisions of the Ohio Revised Code for promulgating and filing agency rules. Section 119.01(C) of the Ohio Revised Code provides for the adoption of regulations other than internal management rules. Departmental Rules filed under Section 111.15 of the Ohio Revised Code relate to internal management which do not affect private rights. (62 Ohio St.2d at 437; App. of P. 50). The Department of Rehabilitation and Correction promulgated and filed the pre-termination removal regulation pursuant to Section 111.15 of the Ohio Revised Code and thus, the Court held, the Department indicated an intent to adopt a rule concerning the internal management of the institutions under their control. The full text of Sections 111.15 and 119.01 of the Ohio Revised Code are found at App. of P. 125-137.

36. 62 Ohio St.2d at 437; App. of P. 48.

This Court has consistently held that it will not disturb a state court's finding of the intent of a statute.[37] Since the decision of the Supreme Court of Ohio was premised upon a determination of the intent of the Departmental Rule according to state law, there are no federal constitutional matters for this Court to review. The Supreme Court of Ohio simply used principles of state administrative law after concluding that the Departmental Rule was not intended to benefit the employees. A statement by the Supreme Court of Ohio certainly lends support to the proposition that the decision of that Court was based upon state administrative law. After concluding its discussion of the intent of the Departmental Rule and noting that the Petitioners had failed to demonstrate prejudice, the Court stated:

> Appellees argue that even if the rule is not interpreted as a mandatory prerequisite to their removals under *state administrative law,* the procedure, in providing a pre-termination hearing, is required under the Due Process clause of the United States Constitution. . . .[38]

Thus, the basis of the Court's decision was "state administrative law" and not federal Due Process.

The framework of analysis used by the Supreme Court of Ohio was essentially the same as the analysis used in *American Farm Lines v. Blackball Freight Service.*[39] *American Farm Lines* differentiated between agency rules designed to confer procedural benefits upon individuals and those rules which were intended primarily to facilitate the development of relevant information for use by the agency. Using the rationale of *American Farm Lines,* a Federal District Court held in *Van Teslaar v. Bender,* [40] that a Coast Guard rule which required

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37. *See, e.g., Albertson v. Millard,* 345 U.S. 242 (1953).

38. 62 Ohio St.2d at 438; App. of P. 52 (Emphasis added).

39. 397 U.S. 532 (1972).

40. 365 F.Supp. 1007 (Md. 1973).

an investigating officer in a disciplinary matter to advise plaintiff of the substance of a complaint and the opportunity to respond was not intended to confer procedural benefits on individuals. The Coast Guard regulations served as a tool of the investigating officer which enabled him to receive information.

The *American Farm Lines* and *Van Teslaar* decisions were based upon principles of administrative law and did not involve constitutional provisions. Similarly, the decision of the Supreme Court of Ohio in the instant case applied principles of state administrative law in addressing Petitioners' argument.[41]

The proposition that internal management procedures of an administrative agency are mandated by the federal constitution was rejected by the Sixth Circuit, Court of Appeals, in *Bates v. Sponberg.*[42] In *Bates,* a tenured faculty member at a university was dismissed, and the university failed to comply with its own rules pertaining to the descharge. The Court refused to adopt the argument that the rules of the university conferred upon plaintiff Due Process rights which could be

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41. Petitioners cite *Service v. Dulles,* 354 U.S. 363 (1957), and *Vitarelli v. Seaton,* 359 U.S. 535 (1959), in support of the proposition that internal discharge regulations are binding upon the adopting agency. (App. of P. 32-35). These cases form the core of what has been called the "Accardi Doctrine". *See, Accardi v. Shaughnessy,* 347 U.S. 260 (1954), and *Usery v. Board of Education of Baltimore County,* 462 F.Supp. 535 (Md. 1978). *Accardi* and its progeny have not been interpreted by any court to require invalidation of an otherwise lawful agency order which is issued in violation of internal agency rules. The case of *American Farm Lines, supra,* n. 39, demonstrates that the "Accardi Doctrine" does not apply if agency rules were designed to govern internal agency procedure rather than to protect the interest of some other party.

In addition, the "Accardi Doctrine" also requires the adverse party to demonstrate that they have been harmed by the agency's failure to comply with its own internal procedures. As stated in *Usery,* the "Accardi Doctrine" and analogous state and federal cases apply "only" in the following circumstances:

> . . .(1) [w]hen the agency's regulations are designed to protect the party dealing with the agency and (2) when the agency's departure from those regulations results in prejudice to that party. 462 F.Supp. at 547.

The present case does not involve the failure of an agency to exercise independent discretion which resulted in prejudice to the adverse party.

42. 547 F.2d 325 (6th Cir. 1976).

asserted in federal court. Violations of agency rules give rise to a federal cause of action, the court held, only when the agency's disregard of its rules results in a procedure which "in itself"[43] impinges upon Due Process rights.[44]

In the present case, the failure of the institution to hold a pre-termination conference did not "in itself"[45] impinge upon Due Process rights. Section 124.34 of the Ohio Revised Code[46] provided for a panoply of rights which Petitioners utilized at their impartial hearing before the State Personnel Board of Review.

It is submitted that Petitioners' argument is based upon a fundamental misunderstanding of "property interests" and the relationship between those interests and Due Process rights. Petitioners have maintained throughout the appellate levels of this case that the striking employees possessed a property interest in the operation of the Departmental Rule. Petitioners have concluded that the Federal Constitution guarantees a pre-termination conference when a state regulation provides for one.[47] Petitioners' argument is in error for the regulation, in and of itself, does not constitute the property interest. There is no authority for the proposition that an employee can possess a property interest in a regulation. The employee's property right is found in his job entitlement and not in a procedural rule. In the present case, the job entitlement of the striking employees was protected by the impartial hearing procedures of state law.[48] The failure of the institution to adhere to an internal management procedure was properly analyzed by the

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43. 547 F.2d at 329.

44. The Sixth Circuit then traced the development of *Accardi, supra,* n. 41, to demonstrate that the basis of the decision was a rule of administrative law and not the Due Process clause. The Court concluded that no constitutional violation was shown, for the mere departure from university regulations, standing alone, did not deprive plaintiff of any constitutional right.

45. *Bates, supra,* n. 42, 547 F.2d at 329.

46. App. of P. 144-149.

47. App. of P. 192, 208.

48. *See,* Ohio Rev. Code Sect. 124.34; App. of P. 144-149.

Supreme Court of Ohio in terms of administrative law. The cases of *Bullock v. Mumford,*[49] and *Little v. City of Jackson,*[50] cited by Petitioners, are easily distinguishable from the present case. *Bullock* and *Little* did not involve a strike by guards at a maximum security prison in full view of the official who would determine the disciplinary penalty. Further, as Petitioners apparently concede, any discussion by these courts of pre-termination requirements was merely *dicta.*[51]

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49. 509 F.2d 384 (D.C. Cir. 1974).

50. 375 So.2d 1031 (Miss. 1979).

51. In *Mumford,* the agency complied with its own rules. In *Little,* the Mississippi Supreme Court held that the Due Process issue had been waived, but deemed it "advisable" to address the pre-termination procedure of Mississippi municipalities. 375 So.2d at 1034.

CONCLUSION

Based upon the foregoing, the Respondents respectfully request that this Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was sent by regular U.S. mail to Mr. John T. Conroy, 150 East Mound Street, Columbus, Ohio 43215; Susan G. Eisenman, 150 East Mound Street, Columbs, Ohio 43215; and David Jenkins, 285 Dorchester Avenue, Boston, Massachusets 02127 on the 17th day of November, 1980.

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